166

TRANSCRIPT OF RECORD

85-796 In S.C.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 30

THE UNITED STATES OF AMERICA ON RELATION OF CHESTER A. WILLOUGHBY, AS TRUSTEE IN BANKRUPTCY OF NATIONAL MECHANICAL SERVICE COMPANY, ET AL., PETITIONERS,

vs.

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 20, 1937.

CERTIORARI GRANTED MAY 24, 1937.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. _____

THE UNITED STATES OF AMERICA ON RELATION OF CHESTER A. WILLOUGHBY, AS TRUSTEE IN BANKRUPTCY OF NATIONAL MECHANICAL SERVICE COMPANY, A CORPORATION, ET AL.,

Petitioners,

vs.

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RECORD

INDEX.

Index to printed record of proceedings in U. S. District Court i
Certificate of Clerk to printed record 387
Record of proceedings in U. S. Circuit Court of Appeals:
Placita 389
Appearance for appellants 389
Reference to filing of stipulation re printing record on Feb. 19, 1936 290
Reference to order as to printing record on Feb. 19, 1936 390
Appearance for appellees 390
Hearing and cause taken under advisement May 19, 1936 391
Order of Oct. 5, 1936, vacating order taking cause under advisement, and restoring cause to calendar 391
Hearing and cause taken under advisement, Nov. 18, 1936 392
Opinion by Lindley, J., filed Jan. 8, 1937 393
Judgment, entered Jan. 8, 1937 405
Reference to filing of petition for a rehearing on Jan. 26, 1937 406
Order of Jan. 29, 1937, denying petition for a rehearing 406
Certificate of Clerk 407
Order allowing certiorari 407

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

No. 5756

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,

Appellants,

vs.

THE UNITED STATES OF AMERICA ON RELATION OF CHESTER A. WILLOUGHBY, AS TRUSTEE IN BANKRUPTCY OF NATIONAL MECHANICAL SERVICE COMPANY, A CORPORATION, ET AL.,

Appellees.

Counsel for Appellants:

MR. JULIUS MOSES,
MR. LLOYD HETH,
MR. WILLIAM P. SMITH,

Counsel for Appellees:

MR. GEORGE B. McKIBBIN,
MR. WALTER E. BEEBE,
MR. HAMILTON K. BEEBE,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

INDEX.

Placita 1
Condensed Complaint 2
The Continental Casualty Company bond of Sam Howard, Trustee of National Mechanical Service Co., Bankrupt, approved Mar. 14, 1931 5
Tabulation of Count Numbers, Names of Estates and information re each case . . . . . 13 to 28
Stipulation and order of Jan. 18, 1936, that condensed complaint be filed and approved and inserted in the record 29-30
Summons 30
Marshal's return 31
Appearance for defendant Continental Casualty Co. 32
Motion of defendant Continental Casualty Co. to dismiss complaint 32
Appearance for defendant Sam Howard 34
Motion of defendant Sam Howard to dismiss complaint. 35
Order of Apr. 18, 1935, overruling motions to dismiss and granting leave to amend complaint, etc. 37
Amendment to complaint 37
Joint and several answer to complaint as amended 38
Order of Aug. 6, 1935, assigning case to Judge Geiger . . 48
Plaintiff's Answer to affirmative defenses of defendants. 48
Order of Sept. 16, 1935, overruling motion to dismiss amended complaint, and consolidating causes for trial. 51
Trial 51
Verdict 52
Order of Oct. 2, 1935, that motion for new trial filed in No. 43996 be considered with same force and effect as though filed in this cause 53
Stipulation and order of Jan. 18, 1936, that motion for new trial be excluded from transcript and for substitution of stipulation in transcript 54-55
Judgment, entered Oct. 18, 1935 56

Bill of Exceptions.

Plaintiff's Witnesses:

Degerman, Amy 124
Feltes, Henry 126
Freeman, Henry W. 134
Gilmour, Marguerite 285, 107
Goossens, Catherine 125
Green, Vincent A. 117
Kay, Margaret 126
Klein, Louise M. 123
Long, Michael J. 121, 118
Ludlow, Ernest W. 138, 113, 80, 68
Morris, E. J. 128
O'Connor, Kiernan 120

Defendant's Witnesses:

Bates, Charles M. 158
Beutel, Clarence A. 180, 162
Claussen, Arthur E. 184
Freeman, Henry W. 277
Gilmour, Marguerite 187
Glaeser, Edward A. 252
Howard, Celia M. 153
Howard, Sam 253
Muir, Joseph A. 144
Pachucke, Anne C. 285, 252, 204, 188
Rosset, Bernard L. 191
Scherer, Ferdinand 185

Plaintiff's Exhibits.

No. 1—The Continental Casualty Company bond of Sam Howard, Trustee in bankruptcy of Bennett's, Inc.... 59
No. 2—List showing amounts of Trustee's bonds executed in Estates involved in Case No. 44241 and showing balance on deposit to credit of Trustee as of date of closing of bank, etc..... 61
No. 3—The Continental Casualty Co. bond of Sam Howard as Receiver of International Golfers, Inc., filed in Bankruptcy Case No. 49279..... 65
No. 4—List showing amounts of Receiver's bonds executed in estates involved in Case No. 44270 and showing net amount on deposit to credit of Receiver as of date of closing of bank, etc..... 67
No. 5—Letter, Sept. 5, 1934, Ludlow to Willoughby, Receiver..... 70
Statement showing monthly balances and ratios, Aug. 31, 1930 to June 21, 1932, of Sam Howard Accounts in Phillips State Bank..... 72
No. 6—Schedules Nos. 2-3—List of deposits in Aug. 1930 and Summary of Sam Howard personal and loan accounts Aug. 1930 to June, 1932..... 73
No. 7—Schedule No. 4—Summary of Sam Howard account, Sept. 30, 1930 to June, 1932..... 75
No. 8—Schedule No. 5—Summary of Sam Howard special account, Aug. 6, 1930 to June 21, 1932..... 76
No. 9—Schedule No. 6—Transcript of Sam Howard loan account, Aug. 6, 1930 to June 21, 1932.....77-78
No. 10—Schedule No. 7—Transcript of account showing Sam Howard's indirect liability as endorser of notes at Phillip State Bank, Dec. 1930 to June, 1932..... 79
Nos. 11 to 18—Publishers certificates showing quarterly statements of condition of Phillips State Bank...83 to 101

No. 19—Statement of Cook County Banks closed between Aug. 1, 1930 and June 21, 1932, for which Receivers were appointed during that period 102
No. 20—Summary of certain records of Phillips State Bank 139
No. 21—Petition of Phillips State Bank to be designated a Depositary 286

Defendant's Exhibits.

No. 1-A—Order of Aug. 20, 1930; approving Phillips State Bank & Trust Co. as a depositary for money of bankrupt estates 143
No. 1—Letter, June 9, 1931, Howard to Muir 155
No. 2—Certified copy of Order of June 11, 1931 directing each Receiver to file with the Clerk of Court a financial statement of amounts deposited by him with depository banks 145
No. 4—Statement showing amounts of funds of Receivers on deposit in depository banks, Summer of 1931.. 157
No. 5—Letter, June 12, 1931, Central Trust Co. to Beutel of Phillips State Bank 179
Nos. 8-9-10—Refused. (Reference to) 210-212
No. 11—Final Distribution Sheet, In re L. Klier, Inc., Bankrupt 214
No. 13—Cash advances made by Sam Howard personally in Estates tied up in Phillips State Bank for which he has never been reimbursed 218
Nos. 14-15—Two adding machine tapes 219-221
No. 16—Check of Sam Howard, Special, to order of Central Trust Co. dated Aug. 5, 1930 226
No. 17—Check of Sam Howard, Special, to order of Foreman State Nat. Bank, dated Aug. 16, 1930 226
Nos. 18 to 23—Withdrawal slips showing withdrawals from Special Account to Sam Howard Account 233-239

Nos. 24 to 29—Checks drawn against Special Account in favor of Sam Howard Account.....242-247
No. 30—Receiver's Certificate, In re Art Lamp Mfg. Co. Bankrupt..... 250
No. 31—Letter, Feb. 7, 1933, Howard to Muir..... 284
No. 32—Statement of Sam Howard of balances in respective depositaries at close of business Jan. 1, 1933. 284
No. 33—Reports of bankruptcy funds on deposit by Receivers and Trustees 279-282
No. 34—Tabulation of Trustees and Receivers Funds in Bankruptcy on deposit as shown from Reports..... 283
Reference to defendant's motion to exclude evidence from jury, and denial of same..... 287
Reference to defendant's motion for directed verdict, and denial of same 287
Arguments and colloquy 287
Defendant's requested instructions to the Jury..... 291
Charge to the Jury 294
Defendant's exceptions to the Charge and rulings thereon 301-304
Reference to verdicts 306
Reference to defendant's motion for new trial, and overruling of same 306
Reference to defendant's motion for judgment, and overruling same 307
Reference to defendant's motion in arrest of judgment, and overruling of same 307
Notice of filing proposed bill of exceptions..... 308
Stipulation for approval of bill of exceptions..... 309
Order approving bill of exceptions..... 309

Notice of appeal 310
Petition for approval 312
Assignments of error 313
Order allowing appeal 348

Appeal and supersedeas bond 349
Praecipe for record 353
Certificate of Clerk 356
Citation 356

Motion for new trial, filed Oct. 2, 1935, in No. 43996 361
Defendant's requested instructions to the Jury 376

Stipulation and order of Feb. 19, 1936, consolidating Causes No. 5756, 5757 and 5758 for hearing and as to printing record 383-386

1 Pleas in the District Court of the United States for the Placita.
Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable F. A. Geiger, District Judge of the United States for the Northern District of Illinois on the Eighteenth day of October, in the year of our Lord one thousand nine hundred and Thirty-Five, being one of the days of the regular October Term of said Court, begun Monday, the Seventh day of October, and of our Independence the 160th year.

Present:

Honorable F. A. Geiger.
William H. McDonnell, U. S. Marshal.
Henry W. Freeman, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

United States of America on Relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al.,

vs.

Sam Howard and Continental Casualty Company, a corporation.

No. 44241

Be It Remembered, that the above-entitled action was commenced by the filing of the Complaint in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 11th day of February, 1935.

d Jan. 18, 936. 3 And on, to wit, the 18th day of January, 1936 came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Condensed Statement of Counts of Complaint in words and figures following, to wit:

4 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—44241)

6 CONDENSED COMPLAINT.

Plaintiffs, by George B. McKibben and Walter E. Beebe, their attorneys, complain of the defendants and say:

(a) The ground upon which the jurisdiction of this court depends is that it is a suit brought by the United States of America on relation of Chester A. Willoughby as Trustee in Bankruptcy of National Mechanical Service Company, a corporation; A. H. Abbott & Co., a corporation; Acme Oil Corporation, a corporation; Advertising Displays, Inc., a corporation; Ajax Furniture Company, a corporation; John Schroeder and Edna J. Schroeder, individually and as co-

partners, doing business as Albany Park Heating Co.; Albert Anderson and Lillian Anderson, individually, and as copartners, doing business as Albert Anderson; Anderson Jewelry Co., a corporation; Architectural Tile and Mosaic Company, Inc., a corporation; Ben Babel; Edward C. Becker; E. J. Biggs, doing business as Biggs Construction Company; Henry H. Brown Cabinet Company, a corporation; Burr Vack Company, a corporation; S. S. Chevlin Co., Inc., a corporation; Chicago Brass Works, a corporation; Cicero Furniture
7 Company, a corporation; John W. Bently Company, a corporation; Ely Blechman; Harry Blumenschein; Harry Chavis, trading as Belmont Shoe Store; Signe Chouinard; Diamond Iron and Metal Company, a corporation; W. I. Draper and Co., (William I. Draper, individually, and doing business as W. I. Draper & Co.); Eagle Metalware Manufacturing Company, a corporation; Froehling and Heppe Co., a corporation; Abraham Furman, doing business as G. & F. Bootery; Gatziolis Bros., Inc., a corporation; Cclman Bond and Mortgage Co., a corporation; Hatch Sattley, Inc., A corporation; Bert Hamburger, individually, and doing business as Phyllis Shop; Sarah D. Hoffman, doing business as the Grove Style Shop; Hans N. Jepson; Irving Kaplan, doing business as Kaplin's Millinery; Peter M. Cibulskis; The Club Managers Service Corp., a corporation; Coffee Dan's Inc., a corporation; Cunningham System, Inc., a corporation; Alfonso Fiorentini, doing business as Intlian Sausage Works; Samuel Friedman, trading as The Gem Box and Kiddies Kloes Shop; James M. Goodell, Jr., Inc., a corporation; Harry Lapping and Max Janosky, individually, and as copartners doing business as George's Cloak and Suit Co.; Harrison's Orange Huts, Inc., a corporation; Janows and Kramer Co., a corporation; Leo Klier; Max L. Lang; Lenora Products Co., a corporation; M. W. Lorch, Inc., a corporation; Stanley Mruk; Gaston L. Alclatore, doing business as Louisiana Restaurant; Carterville and Herrin Coal Co., a corporation; Albert G. Hanisch and Elsie M. Yost, individually, and as copartners, doing business as Hanisch and Yost; Hafner Chevrolet Company, a corporation; Wladyslaw Lewandowski, also known as Walter Lewandowski; McCoy Schulten Company, a corporation; Marine Dredge and Gravel Company, a corporation; Walter M. Merker; Major Isaacson, doing business as Major Paint Store; A. B. C. Tire and Rubber Company, a corporation; A. F. Beard, doing business as Direct Sales and Service Co.; Sam Cherry; Cook, Thomas and Cash, Inc., a

corporation; Earl De Young and Company, a corporation; Harry Graff, Inc., a corporation; Donald R. Kimbark, Inc., a corporation; Kolax Company, Inc., a corporation; Edward I. Leibow; National Theatres Corporation, a corporation; Ida Nauman, doing business as Sydelle Dress Shop; North Shore Tile Company, a corporation; Oro Tone Company, a corporation; Bernard Osberg; Peerless Piston Ring Mfg. Co., Inc., a corporation; also trading under the name of Accurate Auto Parts Corp.; Mrs. Phillips Home Made Candies, Inc., a corporation; Phoenix Coal and Coke Co., a corporation; Piccadilly Pharmacy, Inc., a corporation; Phillip Price, doing business as The Leading Tailors; Maurice A. Price and Louis A. Price, ind. and as copartners, d. b. as Price Brothers; Edward A. Ramsten; Reback, Inc., a corporation; Hyman Resnikoff and David Alberts, individually and as copartners doing business as Resnikoff and Alberts; W. H. Rogers Company, a corporation; L. Rosen, doing business as Roselawn Baby Store; H. R. Rosenbaum Co., a corporation; Simon J. Rosenthal, doing business as Sheridan Vogue Shop; Sall Mountain Company, a corporation; Schack Artificial Flower Company, a corporation; Walter E. Schmuckal; C. W. Schneider; C. A. Smid, individually, and doing business as C. A. Smid and Co.; Southwest Lumber Company, a corporation; Spertus, Inc., a corporation; Harry Graivier, Morris Gertler and Fannie Goldstein, individually and as copartners, doing business as Standard Parlor Furniture Company; Bertha E. Stevens; Lester H. Stone; Moses Stone Company, a corporation; Robert S. Strauss and Company, a corporation; Sucherman Pharmacy, Inc., a corporation; May Swanson, trading as Dixie Donut Shop; Terrace Chocolate Shop, a corporation; R. R. Thompson, doing business as Louise Style Shop; Tilt Top Mfg. Co., a corporation; Tower Recreation of South Chicago, Inc., a corporation; United Department Stores, Inc., a corporation; Max N. Vogel; Webber and Wells, Inc., a corporation; Hugo Weiss, doing business as The United States Die Casting Co.; William H. Weinhoener; Ben Weissman; Whiteside and Wenthworth, Inc., a corporation; Samuel H. Wolk, doing business as Wolk's Style Shop; Midland Products Manufacturing Co., a corporation; bankrupts, upon the official bonds of Sam Howard, formerly Trustee in Bankruptcy of each of said bankrupt estates.

(b) This suit is brought by leave of court first obtained pursuant to an order entered on, to-wit: October 26, 1934, by the Hon. Edmund D. Adcock, Referee in Bankruptcy.

Count 1.

1. That the defendant, Sam Howard, is a citizen and resident of the County of Cook and State of Illinois, and the defendant, Continental Casualty Company, was at all times hereinafter mentioned, a corporation organized under and by virtue of the laws of the State of Indiana, having an office for the transaction of business in the the City of Chicago, County of Cook and State of Illinois.

9 2. That heretofore, on, to-wit: December 22, 1930, National Mechanical Service Company, a corporation, was adjudicated a bankrupt by the United States District Court for the Northern District of Illinois, Eastern Division, in case No. 44986; that thereafter, on, to wit: March 10, 1931, said Sam Howard was duly appointed Trustee of said bankrupt estate.

3. That thereafter said Sam Howard duly qualified as such Trustee and, to insure the faithful performance of his duties as such trustee, secured, executed and filed with the Clerk of this Court a bond with himself as principal and the defendant, Continental Casualty Company, as surety, in the sum of $2,000.00, a copy of which said bond is as follows:

THE CONTINENTAL CASUALTY COMPANY.

General Office: Chicago.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the Matter of National Mechanical Service Company, a corporation, Bankrupt.	In Bankruptcy No. 44986.

Know All Men by These Presents, That we, Sam Howard, of Chicago, Illinois, as Principal, and Continental Casualty Company, a corporation organized and existing under the laws of the State of Indiana, and having an office and principal place of business at No. 910 South Michigan Avenue, City of Chicago, County of Cook, and State of Illinois, as surety, are held and firmly bound unto the United States of America, in the sum ow Two Thousand ($2,000.00) Dollars, in lawful money of the United States, to be paid to the said

United States; for which payment well and truly to be made, we bind ourselves, and our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

Signed and sealed this the 12th day of March, A. D. 1931.

The Condition of This Obligation Is Such, That whereas the above-named Sam Howard was on the 10th day of March, A. D. 1931, appointed Trustee in the case pending in Bankruptcy in said Court, wherein National Mechanical Service Company, a corporation, is the Bankrupt, and he, the said Sam Howard, has accepted said trust with all the duties and obligations pertaining thereunto;

Now, Therefore, If the said Sam Howard, Trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said Bankrupt, which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Witness:

SAM HOWARD (L. S.)
CONTINENTAL CASUALTY COMPANY.
By JOHN H. R. JAMAR
Attorney-in-Fact.

Approved:
HARRY A. PARKIN
Referee in Bankruptcy.
12 March, A. D. 1931.

that said bond was approved by order of Court entered in said proceeding on March 14, 1931.

4. That on, to-wit: March 14, 1931, the defendant, Sam Howard, deposited in the Philip State Bank & Trust Company, an Illinois banking corporation, in the commercial department thereof, in the name of Sam Howard, Trustee in Bankruptcy of National Mechanical Service Company, a corporation, bankrupt, the sum of, to-wit: $1,786.00.

5. That said Sam Howard had been elected trustee and appointed receiver in bankruptcy in a number of other cases pending in the United States District Court for the Northern District of Illinois, and that during the month of August, 1930, commencing on, to-wit: August 25, 1930, he deposited in the said bank in the commercial department thereof the sum of, to-wit: $249,533.32, in various accounts, each in his name as trustee or receiver in bankruptcy for the particular account to which each deposit was made; that from August

25, 1930, to June 21, 1932, the said Sam Howard continued to make deposits to the credit of various bankrupt accounts in the said bank in the commercial department thereof, in his name as trustee or receiver in bankruptcy, and that the total of all of said deposits varied from month to month from the sum of, to-wit: $241,447.26 to $416,833.90, which latter amount was the total on June 21, 1932.

11 6. That on, to-wit: June 21, 1932, the said Phillip State Bank and Trust Company closed its doors, and a receiver was appointed therefor. Since said date said bank has not reopened, and it is now in the process of liquidation.

7. That at the time of the closing of the said Phillip State Bank and Trust Company on June 21, 1932, said Sam Howard had on deposit in the said bank to the credit of himself as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, bankrupt, the sum of, to-wit: $2,417.26.

8. That said Phillip State Bank & Trust Company on or about August 25, 1930, was designated by this Court as an official depositary of funds of receivers and trustees of bankrupt estates and had executed a depositary bond in the penal sum of $50,000.00 to protect the funds belonging to various bankrupt estates deposited in said bank; that thereby the duty rested upon the said Sam Howard not only to keep the deposits made by him in said bank as receiver and as trustee in bankruptcy in a total amount not exceeding the amount of said depositary bond, but also to keep all his such deposits as receiver and as trustee in bankruptcy so limited that together with all amounts deposited by other receivers and trustees in bankruptcy, the total aggregate amount of all such deposits would not exceed the penal sum of said depositary bond.

9. That upon the failure of said Phillip State Bank and Trust Company there was collected on said depositary bond the sum of $50,000.00, from which a distributive dividend of 11.0461% of the amount of each of the various bankruptcy accounts in said bank in the name of said Sam Howard, as receiver and as trustee in bankruptcy, was paid to the said Sam Howard on account thereof; that said Sam Howard, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, bankruptcy, received as a result of said distributive dividend the sum of, to-wit: $267.02, leaving a balance of, to-wit: $2,150.24 credited to the account of Sam Howard as such Trustee, in said bank, which is still due and unpaid.

12 10. That prior to the month of August 1930, there were no funds on deposit in the Phillip State Bank & Trust Company to the credit of Sam Howard as trustee or receiver in bankruptcy, but that during the month of August 1930, and just prior to the time the said Sam Howard commenced to make deposits in the commercial department of said bank as receiver and as a trustee in bankruptcy, the said Sam Howard borrowed personally from the said bank on his unsecured notes, the sum of $11,000.00, and remained indebted to the said bank from August, 1930, until the said bank closed its doors on June 21, 1932, at which time his unsecured notes payable to said bank had increased to the sum of $17,500.00.

11. That the said Phillip State Bank & Trust Company was a small outlying bank, located at the North East corner of Clark Street and Lunt Avenue, Chicago, Illinois; that the total deposits in said bank in August, 1930, at the time that the said Sam Howard as receiver and as trustee deposited said sum of, to-wit: $249,533.32 in said bank were but, to-wit: $3,401,014.29; that the total individual demand deposits were but, to-wit: $1,784,379.15; that the total of government bonds, due from banks, and the case of said bank at the said time were but, to-wit: $888,392.69; that the deposits by said Sam Howard in various bankrupt estates, wherein said Sam Howard was receiver or trustee, had increased by November, 1930, to, to-wit: $390,932.47, and by June 21, 1932, when said bank closed, to, to-wit: $416,833.90; that at the time said bank closed, the total deposits in said bank were but, to-wit: $2,101,710.51, and the total of government bonds due from banks, and cash but, to-wit: $561,721.56; that during all such times Sam Howard negligently, carelessly and improperly deposited and maintained in said bank in his name as receiver and as trustee of bankrupt estates, an unreasonably large amount of money, particularly in view of the fact that at no time from the time of the first deposits by the said Sam Howard as receiver and as trustee in bankruptcy in the said bank to the closing thereof was the said depositary bond in excess of $50,000.00.

13 12. That between the time of the first deposits by said Sam Howard as trustee or reeciver in bankruptcy and the time of the closing of the said bank on June 21, 1932, there were times of heavy withdrawals from said bank, its capital became impaired, and it had other financial difficulties, of which facts said Sam Howard had knowledge, or which, by the exercise of ordinary care, he should have known; that during said period of time the total deposits in said bank decreased

by more than $1,250,000.00; that regardless of the size of said bank, the proportion of said deposits by Sam Howard as receiver and as trustee, to the total amount of deposits in said bank, the size of said depositary bond, and the financial difficulties of said bank, said Sam Howard negligently and carelessly permitted said moneys, including said moneys for the particular estate sued and claimed on in this Count, to remain on deposit in said bank, and during said period of time said Sam Howard continued to deposit moneys to the credit of all of said bankrupt estates and to open accounts for new estates when he was appointed receiver or trustee in bankruptcy, when ordinary care and prudence would have required that the total of the deposits in all of the bankrupt estate in which he was receiver or trustee do not exceed in amount the depositary bond of $50,000.00.

13. That the said Sam Howard did not faithfully and truly account for all the moneys and did not faithfully perform his duties as Trustee in Bankruptcy of the particular estate sued and claimed on in this Count in that he did not report to the courts in writing the condition of the estates and the amounts of money on hand belonging thereto, including the amount of the initial deposit to his credit as Trustee, of said estate and to his credit as trustee or receiver of all the estates of which he was trustee or receiver in bankruptcy, the condition of the Phillip State Bank and Trust Company as to the amount of its total deposits, the proportion which his said deposits as receiver or trustee in bankruptcy as a whole bore to said total deposits in the bank and to the demand deposits therein, and did not, from time to time, make re-
14 ports to the courts of additional deposits by him as receiver or trustee in bankruptcy with information as to the condition of said bank to the time that such bank closed its doors. That the said Sam Howard did not report to the courts his increases in deposits as trustee or receiver at a time when the total deposits in said bank decreased, neither did he report to the courts the heavy withdrawals from the said bank and the decreases in total deposits therein, nor that he obtained a personal unsecured loan from said bank at or about the time he made such initial deposits, and that such personal unsecured loan increased from time to time as his deposits as trustee and receiver increased and as the total deposits in the said bank decreased.

14. That by reason of the fact that said Sam Howard had said unsecured loan from said bank, he did not exercise reasonable care, prudence and caution with respect to the

amount of moneys so deposited by him as receiver and as trustee in bankruptcy of the various estates at the time such moneys were so deposited, and as to the moneys remaining on deposit in said bank to the credit of the various bankrupt estates, and, therefore, did not faithfully perform his duties as Trustee of the particular estate sued and claimed on in this Count.

15. That on, to-wit, May 7, 1934, the resignation of Sam Howard, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, bankrupt, was accepted, and Chester A. Willoughby was appointed as Trustee in his place and stead; that said Chester A. Willoughby thereupon duly qualified as such Trustee, and ever since has been and now is the trustee in Bankruptcy of National Mechanical Service Company, a corporation, bankrupt.

16. That Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, bankrupt, has duly demanded of said Sam Howard the delivery of the said money deposited in said bank, but said Sam Howard has neglected and refused, and still refuses, to deliver to said Chester A. Willoughby, as such Trustee, the said money deposited therein, amounting to, to-wit: $2,150.24, or any part thereof, and thereafter plaintiff made demand on the defendant, Continental Casualty Company, as surety on the official bond of the said Sam Howard, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, bankrupt, for the payment of said sum of money, but the said Continental Casualty Company, as such surety, has failed and refused, and still fails and refuses, to pay said money, or any part thereof, to said Chester A. Willoughby, as such Trustee.

17. That by reason of the premises and because thereby of the failure of the said Sam Howard, as Trustee, to faithfully and truly account for all the moneys, assets and effects of the estate of said National Mechanical Company, a corporation, bankrupt, which came into his hands and possession, and of his failure in all respects to faithfully perform all his official duties as Trustee of said estate, there is now due to the plaintiff and its relator as such Trustee from the said Sam Howard, as principal, and from Continental Casualty Company, as surety, the sum of $2,000.00, all because of the said negligent, careless and improper management of the said funds of the said bankrupt estate by the said Sam Howard as Trustee thereof.

To the damage of the plaintiff in the sum of $2,000.00.

Counts 2 to 113 Inclusive.

Counts 2 to 113 inclusive are the same as Count 1, except as to certain names, dates and amounts as follows:

1. Paragraph 1 of all of said counts is the same as paragraph 1 of count 1.

2. Paragraph 2 of all of said counts is the same as paragraph 2 of count 1 except as to the date of adjudication of the bankrupt which is hereinafter shown under column (3), the name of the bankrupt estate which is hereinafter shown under column (2), the number of the bankrupt estate which is hereinafter shown under column (1) and the date the trustee was appointed which is hereinafter shown under column (4).

16 3. Paragraph 3 of all of said counts is the same as paragraph 3 of count 1 except as to the amount of the trustee's bond which is hereinafter shown under column (5), the name of the bankrupt estate which is hereinafter shown under column (2), the number of the bankrupt estate which is hereinafter shown under column (1), the date of the trustee's bond which is hereinafter shown under column (6), the date of the appointment of the trustee which is hereinafter shown under column (4), the name of the referee approving the bond which is hereinafter shown under column (8) and the date of the approval of said bond which is hereinafter shown under column (7).

4. Paragraph 4 of all of said counts is the same as paragraph 4 of count 1 except as to the date the trustee deposited funds of the estate the Phillip State Bank & Trust Company in the commercial department thereof which is hereinafter shown under column (9), the name of the estate to the credit of which said deposit was made which is hereinafter shown under column (2) and the amount of said deposit which is hereinafter shown under column (10).

5. Paragraph 5 of all of said counts is the same as paragraph 5 of count 1.

6. Paragraph 6 of all of said counts is the same as paragraph 6 of count 1.

7. Paragraph 7 of all of said counts is the same as paragraph 7 of count 1 except the name of the bankrupt estate to the credit of which funds were on deposit in the Phillip State Bank & Trust Company on June 21st, 1932, which is hereinafter shown under column (2), and the amount of said deposit on said date which is hereinafter shown under column (11).

8. Paragraph 8 of all of said counts is the same as paragraph 8 of count 1.

9. Paragraph 9 of all of said counts is the same as paragraph 9 of count 1 except the name of the estate receiving distributive dividends from bankruptcy depositary bond of $50,000.00 which is hereinafter shown under column (12), and the balance remaining after applying said dividend credited to the account of the trustee in this estate, still due and unpaid, which is hereinafter shown under column (13).

Paragraphs 10, 11, 12, 13 and 14 of all of said counts are the same as paragraphs 10, 11, 12, 13 and 14 of count 1.

15. Paragraph 15 of all of said counts is the same as paragraph 15 of count 1 except date of resignation of the trustee hereinafter shown under column (14), the name of estate in bankruptcy wherein resignation was made hereinafter shown under column (2), and the name of the estate wherein Chester A. Willoughby was appointed successor trustee hereinafter shown under column (2).

16. Paragraph 16 of all of said counts is the same as paragraph 16 of count 1 except name of estate in which Chester A. Willoughby, as successor trustee, has duly demanded of Sam Howard, former trustee, delivery of money deposited in the Phillip State Bank and Trust Company which is hereinafter shown under column (2), the amount demanded by said successor trustee of said Sam Howard and Continental Casualty Company which they have refused and failed to pay, which is hereinafter shown under column (15), and the name of the estate wherein said demand was made on said Continental Casualty Company by said successor trustee which is hereinafter shown under column (2).

17. Paragraph 17 of all of said counts is the same as paragraph 17 of count 1 except name of estate wherein the defendant Sam Howard as trustee by reason of the premises has failed to faithfully and truly account for all moneys, assets and effects thereof which came into his hands and possession and to faithfully perform all his official duties as such trustee which is hereinafter shown under column (2), amount due plaintiff by reason thereof from said Sam Howard as trustee, as principal on said bond, and Continental Casualty Company, as surety thereon, which is hereinafter shown under column (15), and plaintiffs' damages in the particular estate which is hereinafter shown under column (16).

All to the damages of plaintiffs in the sum of $216,680.00.

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2	48265	A. N. Abbott & Co. a corporation	Oct. 23, 1931	Dec. 10, 1931	$2,500.00	Dec. 15, 1931	Dec. 16, 1931	Garfield Charles	Dec. 16, 1931	$4,092.22	$2,806.41	$ 310.00	$2,496.41	May 3, 1934	$2,496.41	$2,500.00
3	46629	Acme Oil Corp., a corporation	Apr. 7, 1931	July 23, 1931	500.00	July 24, 1931	July 24, 1931	Harry A. Parkin	July 24, 1931	740.00	732.62	80.93	651.69	May 3, 1934	651.69	500.00
4	46888	Advertising Displays, Inc., a corporation	July 21, 1931	Aug. 14, 1931	4,500.00	Aug. 17, 1931	Aug. 18, 1931	.....	Aug. 18, 1931	4,928.03	2,165.79	299.24	1,926.55	May 3, 1934	1,926.55	2,500.00
5	45965	Ajax Furniture Co. a corporation	Sept. 16, 1931	Oct. 14, 1931	1,000.00	Oct. 15, 1931	Oct. 16, 1931	Harry A. Parkin	Oct 16, 1931	1,087.28	1,088.28	120.22	968.06	May 3, 1934	968.06	1,000.00
6	47758	John Schroeder and Edna Schroeder, individually and as copartners, doing business as Albany Park Heating Co	Aug. 31, 1931	Oct. 15, 1931	1,000.00	Oct. 16, 1931	Oct. 16, 1931	Garfield Charles	Oct. 16, 1931	572.59	557.59	61.60	495.99	May 3, 1934	495.99	700.00
7	46742	Albert Anderson and Lillian Anderson, individually and as copartners, doing business as Albert Anderson	Mar. 30, 1931	Apr. 20, 1931	200.00	Apr. 23, 1931	Apr. 27, 1931	.....	May 15, 1931	356.06	241.06	37.68	303.38	May 3, 1934	200.00	200.00
8	49236	Anderson Jewelry Co. a corporation	Feb. 16, 1932	Mar. 7, 1932	5,000.00	Mar. 10, 1932	March 10, 1932	.....	Mar. 10, 1932	4,453.25	4,591.36	507.17	4,084.19	May 3, 1934	4,084.19	4,500.00
9	42313	Architectural Tiling and Mosaic Co., Inc., a corporation	Aug. 5, 1929	Nov. 12, 1929	2,000.00	Nov. 26, 1929	Nov. 26, 1929	Harry A. Parkin	Nov. 26, 1929	1,357.84	979.56	106.21	871.35	May 3, 1934	871.35	1,000.00
10	49021	Ben Babel	Feb. 4, 1932	Mar. 4, 1932	1,500.00	Mar. 15, 1932	Mar. 15, 1932	Harry A. Parkin	Mar. 15, 1932	843.74	927.58	102.47	825.11	May 4, 1934	825.11	1,000.00
11	43483	Edward C. Becker	Jan. 23, 1930	Feb. 11, 1930	500.00	Feb. 15, 1930	Feb. 17, 1930	Garfield Charles	Aug. 27, 1930	306.85	306.85	33.90	272.95	May 3, 1934	272.95	500.00
12	44811	E. J. Biggs doing business as Biggs Construction Co	July 26, 1930	Sept. 24, 1930	1,000.00	Sept. 26, 1930	Sept. 26, 1930	Harry A. Parkin	Oct. 3, 1930	3.00	956.02	105.61	850.41	May 3, 1934	850.41	1,000.00
13	44264	Henry H. Brown Cabinet Company, a corporation.	May 9, 1930	June 13, 1930	1,000.00	June 16, 1930	June 16, 1930	Henry A. Parkin	Sept. 6, 1930	905.19	728.54	80.48	648.06	May 3, 1934	648.06	800.00
14	47547	Burr Vack Company, a corporation	July 6, 1931	Aug. 14, 1931	2,000.00	Aug. 17, 1931	Aug. 18, 1931	.....	Aug. 18, 1931	2,950.57	3,633.07	401.32	3,231.75	May 4, 1934	2,000.00	2,000.00
15	46290	S. S. Chevlen Co., Inc., a corporation	Feb. 25, 1931	June 4, 1931	1,000.00	June 17, 1931	June 18, 1931	Harry A. Parkin	July 8, 1931	92.60	79.10	8.74	70.36	May 4, 1934	70.36	100.00

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16	47997	Chicago Brass Works, a corporation	Sept. 16, 1931	Nov. 5, 1931	$ 500.00	Nov. 16, 1931	Nov. 17, 1931	Harry A. Parkin	Nov. 17, 1931	$ 713.84	$ 646.39	$ 71.41	$ 574.98	May 4, 1934	$ 500.00	$ 500.00
17	49779	Cicero Furniture House, Inc., a corporation	May 2, 1932	June 10, 1932	1,500.00	June 11, 1932	June 13, 1932	Harry A. Parkin	June 13, 1932	3,648.79	2,448.79	270.50	2,178.29	May 4, 1934	1,500.00	1,500.00
18	49008	John W. Bentley Co., a corporation	Feb. 11, 1932	June 1, 1932	500.00	June 6, 1932	June 8, 1932	Garfield Charles	June 8, 1932	371.18	371.18	41.00	330.18	May 4, 1934	330.18	500.00
19	48924	Ely Blechman	Dec. 31, 1931	Feb. 1, 1932	100.00	Feb. 5, 1932	Feb. 10, 1932	Garfield Charles	Apr. 14, 1932	412.81	369.61	40.83	328.78	May 4, 1934	100.00	100.00
20	49145	Harry Blumenschein	Jan. 20, 1932	Feb. 8, 1932	2,500.00	Feb. 9, 1932	Feb. 10, 1932	Garfield Charles	Apr. 7, 1932	370.01	340.01	37.56	302.45	May 4, 1934	302.45	500.00
21	47772	Harry Chavis, trading as Belmont Shoe Store	Sept. 2, 1931	Oct. 5, 1931	2,500.00	Oct. 7, 1931	Oct. 8, 1931	Garfield Charles	Oct. 8, 1931	2,429.25	1,964.43	217.00	1,747.43	May 4, 1934	1,747.43	2,000.00
22	44793	Signe Chouinard	July 22, 1930	Aug. 14, 1930	1,000.00	Aug. 16, 1930	Aug. 18, 1930	Garfield Charles	Aug. 28, 1930	499.73	620.61	68.56	552.05	May 4, 1934	552.05	600.00
23	48749	Diamond Iron and Metal Company, a corporation	Jan. 29, 1932	Mar. 8, 1932	1,500.00	Mar. 10, 1932	Mar. 10, 1932	Harry A. Parkin	Mar. 10, 1932	750.62	816.57	90.20	726.37	May 4, 1934	726.37	800.00
24	40904	W. I. Draper and Co., (William I. Draper, individually, doing business as W. I. Draper and Co.)	Dec. 10, 1928	Jan. 3, 1929	500.00	Jan. 7, 1929	Jan. 7, 1929	.....	July 22, 1931	100.00	100.00	11.05	88.95	May 4, 1934	88.95	200.00
25	44861	Eagle Metalware Manufacturing Co., a corporation	Sept. 4, 1930	Sept. 23, 1930	8,000.00	Sept. 26, 1930	Sept. 26, 1930	Harry A. Parkin	Sept. 26, 1930	8,120.30	3,968.34	438.46	3,530.88	May 4, 1934	3,530.88	4,000.00
26	44431	Froehling and Heppe Co., a corporation	Apr. 21, 1931	May 18, 1931	500.00	May 19, 1931	May 19, 1931	Harry A. Parkin	Oct. 19, 1931	233.47	233.47	25.80	207.67	May 4, 1934	207.67	300.00
27	47225	Abraham Furman, doing business as G. and F. Bootery	June 10, 1931	July 23, 1931	2,000.00	July 24, 1931	July 24, 1931	Harry A. Parkin	July 24, 1931	1,808.33	1,380.82	152.53	1,228.29	May 4, 1934	1,228.29	1,500.00
28	45422	Gatziolis Bros., Inc., a corporation	Nov. 17, 1930	Dec. 11, 1930	1,000.00	Dec. 18, 1930	Dec. 18, 1930	Harry A. Parkin	Dec. 18, 1930	444.96	1,533.56	169.40	1,364.16	May 4, 1934	1,000.00	1,000.00
29	43332	Goldman Bond and Mortgage Co., a corporation	July 2, 1930	July 24, 1930	1,000.00	July 28, 1930	July 28, 1930	Harry A. Parkin	Oct. 18, 1930	586.21	586.21	64.76	521.45	May 4, 1934	521.45	700.00
30	44062	Hatch Sattley, Inc., a corporation	Oct. 7, 1930	Oct. 28, 1930	5,000.00	Oct. 29, 1930	Oct. 29, 1930	Harry A. Parkin	Dec. 4, 1930	1,008.02	2,458.73	271.60	2,187.13	May 4, 1934	2,187.13	2,500.00

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31	49010	Bert Hamburger, individually, and doing business as Phyllis Shop...	Jan. 14, 1932	Mar 2, 1932	$1,000.00	Mar. 10, 1932	Mar. 10, 1932	Harry A. Parkin	Mar. 10, 1932	$ 834.28	$ 819.28	$ 90.50	$ 728.78	May 5, 1934	$ 728.78	$ 1,000.00
32	45491	Sarah D. Hoffman, doing business as The Grove Style Shop.....	Nov. 6, 1930	Nov. 25, 1930	500.00	Nov. 28, 1930	Nov. 28, 1930	Harry A. Parkin	Mar. 12, 1931	100.50	15.75	1.74	14.01	May 5, 1934	14.01	50.00
33	45915	Hans N. Jepsen.....	Dec. 18, 1930	Jan. 7, 1931	2,000.00	Jan. 9, 1931	Jan. 10, 1931	Harry A. Parkin	Jan. 31, 1931	14.50	514.50	56.84	457.66	May 5, 1934	457.66	500.00
34	46617	Irving Kaplan, doing business as Kaplan's Millinery.....	Mar. 9, 1931	Mar. 30, 1931	1,500.00	Mar. 31, 1931	Apr. 3, 1931	.....	Apr. 15, 1931	367.08	207.08	22.88	184.20	May 5, 1934	184.20	250.00
35	45234	Peter M. Cibulskis.....	Mar. 4, 1931	July 15, 1931	500.00	July 17, 1931	July 17, 1931	Garfield Charles	July 17, 1931	182.11	217.11	23.99	193.12	May 4, 1934	193.12	250.00
36	48733	The Club Managers Service Corp., a corporation	Feb. 16, 1932	May 12, 1932	500.00	May 14, 1932	May 17, 1932	Garfield Charles	May 17, 1932	335.61	335.61	37.08	298.53	May 4, 1934	298.53	400.00
37	47372	Coffee Dan's, Inc., a corporation.....	July 9, 1931	Aug. 6, 1931	1,000.00	Aug. 8, 1931	Aug. 8, 1931	.....	Aug. 8, 1931	658.20	643.20	71.05	572.15	May 4, 1934	572.15	700.00
38	47318	Cole and Dunas Music Co., a corporation.....	July 6, 1931	July 27, 1931	3,000.00	July 31, 1931	July 31, 1931	Harry A. Parkin	July 31, 1931	2,924.59	2,762.28	305.13	2,457.15	May 5, 1934	2,457.15	2,700.00
39	47502	Cunningham System, Inc., a corporation....	July 6, 1931	Aug. 26, 1931	3,500.00	Aug. 28, 1931	Sept. 3, 1931	Garfield Charles	Sept. 3, 1931	2,839.08	2,143.58	236.79	1,906.79	May 4, 1934	1,906.79	2,500.00
40	46700	Alfonso Fiorentini, doing business as Italian Sausage Works.....	Mar. 19, 1931	Apr. 23, 1931	200.00	Apr. 29, 1931	May 1, 1931	.....	May 25, 1931	21.70	21.70	2.41	19.29	May 4, 1934	19.29	50.00
41	46345	Samuel Friedman, trading as The Gem Box and Kiddies Kloes Shop...	Feb. 13, 1931	Mar. 4, 1931	1,000.00	Mar. 7, 1931	Mar. 9, 1931	Garfield Charles	Mar. 9, 1931	541.80	231.80	25.62	206.18	May 4, 1934	206.18	300.00
42	46453	James M. Goodell, Jr., Inc., a corporation....	Feb. 24, 1931	Mar. 13, 1931	1,000.00	Mar. 18, 1931	Mar. 20, 1931	Garfield Charles	June 4, 1932	250.00	250.00	27.62	222.38	May 4, 1934	222.38	300.00
43	47774	Harry Lapping and Max Janosky, individually and as co-partners doing business as George's Cloak and Suit Co.....	Aug. 24, 1931	Oct. 19, 1931	2,500.00	Oct. 21, 1931	Oct. 21, 1931	Garfield Charles	Oct. 21, 1931	2,696.18	1,710.78	188.98	1,521.80	May 4, 1934	1,521.80	2,000.00
44	47565	Harrison's Orange Huts, Inc., a corporation....	Dec. 15, 1931	Feb. 3, 1932	1,000.00	Feb. 5, 1932	Feb. 9, 1932	Harry A. Parkin	Feb. 9, 1932	259.21	759.21	83.87	675.34	May 5, 1934	675.34	800.00

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22																
45	47686	Janows and Kramer Co., a corporation	Aug. 10, 1931	Sept. 14, 1931	$5,000.00	Sept. 17, 1931	Sept. 17, 1931	Harry A. Parkin	Sept. 17, 1931	$6,560.44	$5,962.20	$ 658.59	$5,303.61	May 5, 1934	$5,000.00	$5,000.00
46	49153	Leo Klier	Feb. 26, 1932	Mar. 22, 1932	3,500.00	Mar. 30, 1932	Mar. 31, 1932	.....	Mar. 31, 1932	3,647.80	3,590.32	396.60	3,193.72	May 5, 1934	3,193.72	3,500.00
47	42668	Max J. Lang	Sept. 7, 1929	Sept. 25, 1929	2,000.00	Sept. 25, 1929	Sept. 26, 1929	Harry A. Parkin	Oct. 22, 1930	354.40	354.40	39.16	315.24	May 5, 1934	315.24	500.00
48	47574	Lenora Products Co., a corporation	Oct. 5, 1931	Dec. 8, 1931	1,000.00	Dec. 10, 1931	Dec. 11, 1931	Harry A. Parkin	Dec. 11, 1931	244.00	219.00	24.19	194.81	May 5, 1934	194.81	300.00
49	37194	M. W. Lorch, Inc., a corporation	Mar. 2, 1927	Mar. 22, 1927	3,000.00	Mar. 23, 1927	Mar. 23, 1927	.....	Oct. 18, 1930	2,903.75	1,337.70	147.77	1,189.93	May 5, 1934	1,189.93	1,500.00
50	41671	Stanley Mruk	Mar. 28, 1929	Apr. 24, 1929	200.00	May 1, 1929	May 4, 1929	.....	Oct. 18, 1930	212.59	212.59	23.50	189.09	May 5, 1934	189.09	200.00
51	49712	Gaston L. Alciatore, doing business as Louisiana Restaurant	Apr. 11, 1932	May 3, 1932	1,000.00	May 6, 1932	May 6, 1932	Harry A. Parkin	May 6, 1932	897.56	902.56	99.70	802.86	May 5, 1934	802.86	1,000.00
52	49109	Carterville and Herrin Coal Co., a corporation	Feb. 10, 1932	Apr. 6, 1932	10,000.00	Apr. 7, 1932	Apr. 8, 1932	.....	Apr. 8, 1932	5,146.47	2,630.47	290.57	2,339.90	May 5, 1934	2,339.90	3,000.00
53	49063	Albert G. Hanisch and Elsie M. Yost, individually, and as co-partners, doing business as Hanisch and Yost	Feb. 3, 1932	Mar. 28, 1932	1,500.00	Apr. 6, 1932	Apr. 6, 1932	Garfield Charles	Apr. 6, 1932	2,031.43	2,032.94	224.56	1,808.38	May 5, 1934	1,500.00	1,500.00
54	48279	Hafner Chevrolet Company, a corporation	Nov. 3, 1931	Dec. 29, 1931	5,000.00	Jan. 4, 1932	Jan. 5, 1932	Harry A. Parkin	Jan. 5, 1932	10,088.83	6,928.11	765.29	6,162.82	May 5, 1934	5,000.00	5,000.00
55	49739	Wladyslaw Lewandowski, also known as Walter Lewandowski	Mar. 26, 1932	Apr. 13, 1932	3,000.00	Apr. 18, 1932	Apr. 19, 1932	.....	Apr. 19, 1932	271.53	961.82	106.25	855.57	May 5, 1934	855.57	1,000.00
23																
56	48209	McCoy Schulten Company, a corporation	Oct. 14, 1931	Nov. 10, 1931	5,000.00	Nov. 14, 1931	Nov. 17, 1931	Garfield Charles	Nov. 17, 1931	$4,605.06	5,303.52	585.84	4,717.68	May 5, 1934	4,717.68	5,000.00
57	46877	Marine Dredge and Gravel Company, a corporation	June 4, 1931	Aug. 7, 1931	1,000.00	Aug. 8, 1931	Aug. 8, 1931	.....	Aug. 8, 1931	7.20	198.77	21.96	176.81	May 5, 1934	176.81	300.00
58	47787	Walter H. Merker	Aug. 22, 1931	Sept. 11, 1931	1,000.00	Sept. 12, 1931	Sept. 19, 1931	.....	Sept. 12, 1931	635.30	605.30	66.87	538.43	May 5, 1934	538.43	600.00
59	45825	Major Isaacson, doing business as Major Paint Store	Mar. 18, 1931	Apr. 20, 1931	200.00	Apr. 23, 1931	Apr. 27, 1931	.....	Apr. 27, 1931	329.28	229.28	25.33	203.95	May 5, 1934	200.00	200.00

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60	46301	A. B. C. Tire and Rubber Company, a corporation	Feb. 13, 1931	Apr. 6, 1931	$ 2,000.00	Apr. 9, 1931	Apr. 9, 1931	Garfield Charles	Apr. 21, 1931	$ 7,059.23	$ 18.44	$ 2.04	$ 16.40	May 9, 1934	$ 16.40	$ 50.00
61	45580	A. F. Beard, doing business as Direct Sales and Service Company	Nov. 21, 1930	Dec. 15, 1930	16,000.00	Dec. 18, 1930	Dec. 18, 1930	Harry A. Parkin	Dec. 18, 1930	153.90	34.67	3.83	30.84	May 9, 1934	30.84	50.00
62	45252	Sam Cherry	Oct. 3, 1930	Mar. 5, 1931	500.00	Mar. 7, 1931	Mar. 9, 1931	Garfield Charles	Mar. 9, 1931	371.15	6.51	.72	5.79	May 9, 1934	5.79	10.00
63	43620	Cook, Thomas and Cash, Inc., a corporation	Feb. 21, 1930	Mar. 17, 1930	500.00	Mar. 18, 1930	Mar. 19, 1930	Harry A. Parkin	Aug. 27, 1930	562.41	88.50	9.78	78.72	May 9, 1934	78.72	100.00
64	48442	Earl DeYoung and Company, a corporation	Nov. 18, 1931	Dec. 18, 1931	3,000.00	Dec. 22, 1931	Dec. 22, 1931	Garfield Charles	Dec. 22, 1931	808.00	1,743.69	192.61	1,551.08	May 7, 1934	1,551.08	2,000.00
65	48570	Harry Graff, Inc	Dec. 4, 1931	Feb. 9, 1932	20,000.00	Feb 15, 1932	Feb. 15, 1932	Harry A. Parkin	Feb. 15, 1932	5,143.24	473.77	52.34	421.43	May 8, 1934	421.43	500.00
66	49989	Donald R. Kimbark, Inc., a corporation	May 12, 1932	June 7, 1932	5,000.00	June 8, 1932	June 9, 1932	Harry A. Parkin	June 9, 1932	3,927.17	8,162.97	901.70	7,261.27	May 7, 1934	5,000.00	5,000.00
67	44893	Kolax Company, Inc. a corporation	Aug. 6, 1930	Sept. 5, 1930	1,000.00	Sept. 9, 1930	Sept. 11, 1930	Harry A. Parkin	Sept. 11, 1930	5,433.94	67.56	7.47	60.09	May 9, 1934	60.09	100.00
68	49752 & 49753	Edward I. Leibow	Apr. 15, 1932	June 10, 1932	10,000.00	June 11, 1932	June 13, 1932	Harry A. Parkin	June 13, 1932	225.29	225.29	24.89	200.40	May 9, 1934	200.40	300.00
69	40252	National Theatres Corporation, a corporation	Aug. 3, 1928	Oct. 1, 1928	1,000.00	Oct. 2, 1928	Oct. 2, 1928	.....	Aug. 25, 1930	132,707.00	52,174.17	5,763.21	46,410.96	May 7, 1934	1,000.00	1,000.00
70	48847	Ida Nauman, doing business as Sydelle Dress Shop	Jan. 9, 1932	Feb. 15, 1932	1,500.00	Feb. 24, 1932	Feb. 24, 1932	Garfield Charles	Feb. 24, 1932	1,404.51	1,124.08	124.17	999.91	May 7, 1934	999.91	1,100.00
71	44540	North Shore Tile Company, a corporation	June 25, 1930	Oct. 6, 1930	200.00	Oct. 13, 1930	Oct. 13, 1930	Garfield Charles	Oct. 13, 1930	456.51	450.58	49.78	400.80	May 7, 1934	200.00	200.00
72	48427	Oro Tone Company, a corporation	Nov. 9, 1931	Nov. 30, 1931	2,500.00	Dec. 2, 1931	Dec. 2, 1931	Garfield Charles	Dec. 2, 1931	201.56	3,147.93	347.73	2,800.20	May 7, 1934	2,500.00	2,500.00
73	46575	Bernard Osberg	Mar. 4, 1931	Mar. 23, 1931	1,500.00	Mar. 25, 1931	Mar. 25, 1931	Harry A. Parkin	Apr. 1, 1931	208.17	185.67	20.51	165.16	May 7, 1934	165.16	200.00
74	46158	Peerless Piston Ring Mfg. Co., Inc., a corporation, also trading under the name of Accurate Auto Parts Corp	Mar. 30, 1931	Apr. 22, 1931	4,000.00	Apr. 29, 1931	May 1, 1931	Harry A. Parkin	May 1, 1931	3,959.24	1,695.50	187.29	1,508.21	May 7, 1934	1,508.21	2,000.00

(1) Count Number	(2) Number of Estate	(2) Name of Estate	(3) Date of Adjudication	(4) Date Trustee Appointed	(5) Amount of Trustee's Bond	(6) Date of Trustee's Bond	(7) Date Trustee's Bond Approved	(8) Referee Approving Bond	(9) Date of Trustee's deposit in Bank	(10) Amount of Trustee's Deposit	(11) Amount on Deposit June 21, 1932	(12) Distributive Dividend received from depository bond	(13) Balance remaining to credit of trustee after application of distributive dividend from depository bond	(14) Date of Trustee's resignation	(15) Amount demanded by and due plaintiff	(16) Plaintiff's Damages
75	49421	Mrs. Phillips Home Made Candies, Inc., a corporation	Mar. 10, 1932	May 23, 1932	$3,000.00	May 27, 1932	May 26, 1932	Harry A. Parkin	May 26, 1932	$2,725.49	$2,726.65	$ 301.20	$2,425.45	May 7, 1934	$2,425.45	$3,000.00
76	49142	Phoenix Coal and Coke Co., a corporation	Jan. 20, 1932	Feb. 8, 1932	1,000.00	Feb. 9, 1932	Feb. 10, 1932	Garfield Charles	Feb. 10, 1932	792.07	1,856.32	205.05	1,651.27	May 7, 1934	1,000.00	1,000.00
77	47732	Piccadilly Pharmacy Inc, a corporation	Oct. 7, 1931	Nov. 16, 1931	1,000.00	Nov. 17, 1931	Nov. 17, 1931	Garfield Charles	Nov. 17, 1931	3,177.58	2,855.22	315.40	2,539.82	May 7, 1934	1,000.00	1,000.00
78	46212	Phillip Price, doing business as The Leading Tailors	Feb. 9, 1931	Mar. 3, 1931	1,000.00	Mar. 7, 1931	Mar. 9, 1931	Garfield Charles	Mar. 9, 1931	1,025.80	10.00	1.11	9.89	May 9, 1934	9.89	20.00
79	49760	Maurice A. Price & Louis A. Price, ind. and as copartners, d. b. as Price Brothers	May 2, 1932	May 24, 1932	2,000.00	May 26, 1932	May 26, 1932	Harry A. Parkin	May 26, 1932	2,822.02	2,822.02	311.73	2,510.29	May 7, 1934	2,000.00	2,000.00
80	47937	Edward A. Ramsten	Aug. 31; 1931	Sept. 22, 1931	1,000.00	Sept. 23, 1931	Sept. 24, 1931	Harry A. Parkin	Sept. 24, 1931	489.50	84.50	9.34	75.16	May 7, 1934	75.16	100.00
81	48496	Reback, Inc., a corporation	Nov. 23, 1931	Dec. 28, 1931	15,000.00	Jan. 4, 1932	Jan. 5, 1932	Harry A. Parkin	Jan. 5, 1932	7,093.24	14,556.10	1,607.22	12,942.88	May 7, 1934	12,942.88	15,000.00
82	47282	Hyman Resnikoff and David Alberts, individually, and as copartners doing business as Resnikoff and Alberts	Sept. 26, 1931	Oct. 28, 1931	500.00	Nov. 3, 1931	Nov. 4, 1931	Garfield Charles	Nov. 4, 1931	666.07	512.90	56.66	456.24	May 7, 1934	456.24	500.00
83	44130	W. H. Rogers Company, a corporation	Apr. 18, 1930	May 23, 1930	5,000.00	May 28, 1930	May 28, 1930	Garfield Charles	Sept. 27, 1930	12,271.15	7,431.01	820.84	6,610.17	May 7, 1934	5,000.00	5,000.00
84	46275	L. Rosen, doing business as Roselawn Baby Store	Mar. 25, 1931	Apr. 24, 1931	1,500.00	Apr. 29, 1931	May 1, 1931	Harry A. Parkin	May 1, 1931	1,628.06	7.83	.87	6.96	May 9, 1934	6.96	50.00
85	49117	H. R. Rosenbaum Co., a corporation	Feb. 11, 1932	Mar. 9, 1932	30,000.00	Mar. 15, 1932	Mar. 15, 1932	Harry A. Parkin	Mar. 15, 1932	37,908.09	31,616.58	3,492.41	28,124.17	May 7, 1934	28,124.17	30,000.00
86	47150	Simon J. Rosenthal, doing business as Sheridan Vogue Shop	May 12, 1931	May 27, 1931	500.00	June 17, 1931	June 18, 1931	Garfield Charles	Oct. 20, 1931	101.15	66.76	7.39	59.37	May 7, 1934	59.37	100.00
87	48707	Sall Mountain Company a corporation	Dec. 21, 1931	Feb. 4, 1932	10,000.00	Feb. 9, 1932	Feb. 10, 1932	Harry A. Parkin	Feb. 10, 1932	9,811.95	6,383.72	705.16	5,678.56	May 7, 1934	5,678.56	6,000.0 0
88	46952	Schack Artificial Flower Company, a corporation	Apr. 17, 1931	May 6, 1931	10,000.00	May 7, 1931	May 8, 1931	Harry A. Parkin	May 8, 1931	11,930.35	11,451.83	1,265.01	10,186.82	May 7, 1934	10,000.00	10,000.00

Count Number	(1) Number of Estate	(2) Name of Estate	(3) Date of Adjudication	(4) Date Trustee Appointed	(5) Amount of Trustee's Bond	(6) Date of Trustee's Bond	(7) Date Trustee's Bond Approved	(8) Referee Approving Bond	(9) Date of Trustee's deposit in Bank	(10) Amount of Trustee's Deposit	(11) Amount on Deposit June 21, 1932	(12) Distributive Dividend received from depository bond	(13) Balance remaining to credit of trustee after application of distributive dividend from depository bond	(14) Date of Trustee's resignation	(15) Amount demanded by and due plaintiff	(16) Plaintiff's Damages
89	47778	Walter E. Schmuckal....	Aug. 20, 1931	Sept. 22, 1931	$1,000.00	Sept. 23, 1931	Sept. 24, 1931	Garfield Charles	Sept. 24, 1931	$ 602.96	$ 572.96	$ 63.29	$ 509.67	May 7, 1934	$ 509.67	$ 600.00
90	49358	C. W. Schneider.....	Mar. 8, 1932	Apr. 4, 1932	200.00	Apr. 6, 1932	Apr. 8, 1932	.....	Apr. 8, 1932	200.00	200.00	22.10	177.90	May 8, 1934	177.90	200.00
91	48905	C. A. Smid, individually, and doing business as C. A. Smid and Company.....	Jan. 19, 1932	Feb. 24, 1932	2,000.00	Mar. 2, 1932	Mar. 4, 1932	Harry A. Parkin	Mar. 4, 1932	3,815.67	3,846.00	424.84	3,421.16	May 8, 1934	2,000.00	2,000.00
92	47988	Southwest Lumber Company, a corporation...	Oct. 6, 1931	Dec. 4, 1931	2,000.00	Dec. 8, 1931	Dec. 8, 1931	Harry A. Parkin	Dec. 8, 1931	1,694.23	1,703.71	188.20	1,515.51	May 7, 1934	1,515.51	2,000.00
93	48380	Spertus, Inc., a corporation.....	Nov. 5, 1931	Nov. 25, 1931	1,500.00	Dec. 9, 1931	Dec. 9, 1931	Harry A. Parkin	Dec. 9, 1931	14.00	742.74	82.05	660.69	May 7, 1934	660.69	1,000.00
94	46470	Harry Graivier, Morris Gertler and Fannie Goldstein, individually and as copartners, doing business as Standard Parlor Furniture Co.....	Mar. 31, 1931	May 14, 1931	2,500.00	May 19, 1931	May 19, 1931	Harry A. Parkin	May 19, 1931	70.00	2,974.10	328.53	2,645.57	May 7, 1934	2,500.00	2,500.00
95	45912	Bertha E. Stevens.....	Dec. 16, 1930	Mar. 16, 1931	200.00	Mar. 25, 1931	Mar. 25, 1931	.....	Mar. 2, 1932	5,045.83	586.41	64.78	521.63	May 9, 1934	200.00	200.00
96	48956	Lester H. Stone.....	Jan. 22, 1932	Feb. 11, 1932	1,000.00	Feb. 15, 1932	Feb. 15, 1932	Garfield Charles	Feb. 15, 1932	1,692.11	1,680.93	185.69	1,495.24	May 8, 1934	1,000.00	1,000.00
97	48935	Moses Stone Company, a corporation.....	Jan. 18, 1932	Feb. 8, 1932	10,000.00	Feb. 9, 1932	Feb. 10, 1932	Garfield Charles	Feb. 10, 1932	3,156.69	11,891.80	1,313.60	10,578.20	May 7, 1934	10,000.00	10,000.00
98	45408	Robert S. Strauss and Company, a corporation.....	Nov. 10, 1930	Dec. 2, 1930	500.00	Dec. 4, 1930	Dec. 4, 1930	Garfield Charles	Dec. 4, 1930	824.89	4,389.49	484.88	3,904.61	May 7, 1934	500.00	500.00
99	48605	Sucherman Pharmacy Inc., a corporation....	Dec. 14, 1931	Jan. 25, 1932	1,000.00	Jan. 30, 1932	Feb. 1, 1932	Garfield Charles	Feb. 1. 1932	578.25	548.25	60.56	487.69	May 7, 1934	487.69	600.00
100	43553	May Swanson, trading as Dixie Donut Shop.....	May 5, 1930	June 16, 1930	1,300.00	June 17, 1930	June 18, 1930	Garfield Charles	Aug. 27, 1930	1,343.20	16.73	1.85	14.88	May 9, 1934	14.88	50.00

Count Number	(1) Number of Estate	(2) Name of Estate	(3) Date of Adjudication	(4) Date Trustee Appointed	(5) Amount of Trustee's Bond	(6) Date of Trustee's Bond	(7) Date Trustee's Bond Approved	(8) Referee Approving Bond	(9) Date of Trustee's deposit in Bank	(10) Amount of Trustee's Deposit	(11) Amount on Deposit June 21, 1932	(12) Distributive Dividend received from depository bond	(13) Balance remaining to credit of trustee after application of distributive dividend from depository bond	(14) Date of Trustee's resignation	(15) Amount demanded by and due plaintiff	(16) Plaintiff's Damages
101	42416	Terrace Chocolate Shop, a corporation	Dec. 18, 1931	Jan. 8, 1932	$ 200.00	Jan. 12, 1932	Jan. 12, 1932	Garfield Charles	Jan. 12, 1932	$ 312.04	$ 312.04	$ 34.48	$ 277.56	May 8, 1934	$ 200.00	$ 200.00
102	47343	R. R. Thompson, doing business as Louise Style Shop	June 16, 1931	Aug. 24, 1931	1,500.00	Aug. 27, 1931	Aug. 28, 1931	Garfield Charles	Aug. 28, 1931	1,753.46	1,235.05	136.43	1,098.62	May 8, 1934	1,098.62	1,200.00
103	46505	Tilt Top Mfg. Co., a corporation	Sept. 9, 1931	Oct. 5, 1931	13,000.00	Oct. 7, 1931	Oct. 8, 1931	Harry A. Parkin	Oct. 8, 1931	11,517.24	67.50	7.47	60.03	May 9, 1934	60.03	100.00
104	44461	Tower Recreation of South Chicago, Inc. a corporation	Dec. 10, 1931	Jan. 7, 1932	500.00	Jan. 12, 1932	Jan. 12, 1932	Garfield Charles	Jan. 30, 1932	67.50	67.50	7.47	60.03	May 8, 1934	60.03	100.00
105	46942	United Department Stores, Inc., a corporation	Jan. 15, 1932	Feb. 8, 1932	10,000.00	Feb. 9, 1932	Feb. 10, 1932	Harry A. Parkin	Feb. 10, 1932	9,832.26	7,855.53	867.74	6,987.79	May 8, 1934	6,987.79	8,000.00
106	47830	Max N. Vogel	Aug. 31, 1931	Sept. 24, 1931	7,000.00	Sept. 30, 1931	Oct. 1, 1931	.....	Oct. 1, 1931	5,806.10	7,674.22	847.71	6,826.51	May 8, 1934	6,826.51	7,000.00
107	48044	Webber and Wells, Inc., a corporation	Oct. 3, 1931	Nov. 2, 1931	5,000.00	Nov. 4, 1931	Nov. 4, 1931	Harry A. Parkin	Nov. 4, 1931	238.05	1,116.75	123.37	993.38	May 8, 1934	993.38	1,100.00
108	47463	Hugo Weiss, doing business as The United States Die Casting Co.	July 1, 1931	July 30, 1931	1,500.00	Aug. 11, 1931	Aug. 12, 1931	.....	Aug. 12, 1931	1,015.97	827.49	91.42	736.07	May 8, 1934	736.07	900.00
109	46790	William H. Weinhoeber	Mar. 30, 1931	Apr. 20, 1931	500.00	Apr. 23, 1931	Apr. 25, 1931	.....	Aug. 24, 1931	1,266.52	7.51	.84	6.67	May 9, 1934	6.67	50.00
110	45842	Ben Weissman	Dec. 8, 1930	Jan. 2, 1931	1,000.00	Jan. 9, 1931	Jan. 10, 1931	Garfield Charles	Jan. 10, 1931	795.75	50.00	5.53	44.47	May 9, 1934	44.47	100.00
111	45679	Whiteside and Wentworth, Inc., a corporation	Jan. 24, 1931	Feb. 11, 1931	10,000.00	Feb. 17, 1931	Feb. 18, 1931	Harry A. Parkin	Feb. 18, 1931	3,452.89	8,898.82	982.98	7,915.84	May 8, 1934	7,915.84	9,000.00
112	45953	Samuel H. Wolk, doing business as Wolk's Style Shop	Jan. 20, 1931	Feb. 10, 1931	1,500.00	Feb. 12, 1931	Feb. 12, 1931	Garfield Charles	Feb. 12, 1931	1,545.71	926.37	102.34	824.03	May 8, 1934	824.03	1,000.00
113	49450	Midland Products Manufacturing Co., a corporation	Mar. 28, 1932	Apr. 25, 1932	1,000.00	Apr. 27, 1932	Apr. 28, 1932	Garfield Charles	Apr. 28, 1932	939.94	939.94	103.83	836.11	May 7, 1934	836.11	1,000.00

29 GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for Plaintiffs.

30 And on, to wit, the 18th day of January, 1936 came the parties by their attorneys and filed in the Clerk's office of said Court a certain Stipulation in words and figures following, to wit: Filed Jan. 18, 1936.

31 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44241) * *

STIPULATION.

It Is Stipulated and Agreed by and between the parties hereto by their respective attorneys of record that, in preparing and certifying the transcript of record in this cause for use in the Circuit Court of Appeals, the Clerk of this court shall include in said transcript of record the condensed statement of the contents of the complaint, attached hereto and made part of this stipulation, and that this stipulation shall be included in said transcript of record in this cause in lieu of said complaint and shall have the same force and effect as though said complaint were incorporated in said transcript of record of this cause.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for Plaintiffs.
JULIUS MOSES,
Attorneys for Defendant Sam Howard.
LLOYD D. HETH,
WM. P. SMITH,
Attorneys for Defendant Continental Casualty Company.

32 And afterwards, to wit, on the 18th day of January, 1936, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable F. A. Geiger, District Judge appears the following entry, to wit:

Entered Jan. 18, 1936.

33 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

ORDER.

This cause having come on to be heard this 18th day of January, 1936, it is by agreement of the parties

Ordered that the stipulation of said parties hereto with respect to the insertion by the Clerk of this Court in the transcript of record in this cause of the condensed statement of the contents of the complaint, this day filed herein, be and the same is hereby approved.

Enter:

F. A. GEIGER,
Judge.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for Plaintiffs.
JULIUS MOSES,
Attorneys for Defendant Sam Howard.
LLOYD D. HETH,
WM. P. SMITH,
Attorneys for Defendant Continental Casualty Company.

Filed Mar. 23, 1935.

34 And on, to wit, the 23rd day of March, 1935, there was filed in the Clerk's office of said Court a certain SUMMONS with Marshal's return endorsed thereon in words and figures following, to wit:

35 DISTRICT COURT OF THE UNITED STATES OF AMERICA,

Northern District of Illinois.

The President of the United States of America, To the Marshal of the Northern District of Illinois—Greeting:

We Command You to Summon Sam Howard and Continental Casualty Company, a corporation, if found in your District, to be and appear before our Judge of the District Court of the United States for the Northern District of Illi-

nois, on the first day of the next Term thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of April next, to answer unto United States of America on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al., of a Complaint at Law to his damages, as he alleges, of Two Hundred Sixteen Thousand Six Hundred Eighty and no/100 Dollars ($216,680.00) and have you then and there this Writ.

Witness, the Hon. James H. Wilkerson, Judge of the District Court of the United States of America, at Chicago aforesaid, this 1st day of March, in the year of our Lord one thousand nine hundred and 35 and of our Independence the 159th year.

CHARLES M. BATES,
Clerk.

(Seal)

Served this writ on the within named Sam Howard by reading the same to him and by leaving a copy thereof with Sam Howard in person this 7th day of March, A. D. 1935.

Served this writ on the within named Continental Casualty Company a corporation by delivering a copy thereof to R. C. d'Autremont, Attorney and Agent of said corporation this 6th day of March 1935. The President of said corporation not found in my district.

WM. H. MCDONNELL,
U. S. Marshal.
by JOSEPH KONRATH,
Deputy.

Marshal's fees

2 services	$4.00
In lieu miles	.20
	$4.20

36 And on, to wit, the 20th day of March, 1935, came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain APPEARANCE in words and figures following, to wit:

37 DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44241) * *

I hereby enter the appearance of Continental Casualty Company, defendant, and ourselves as attorneys in the above-entitled cause.

HETH & LISTER and
WILLIAM P. SMITH,
Defendant's Attorney.

Mar. 20, 1935. 38 And on, to wit, the 20th day of March, 1935 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Motion in words and figures following, to wit:

39 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44241) * *

MOTION OF CONTINENTAL CASUALTY COMPANY, A CORPORATION, TO DISMISS COMPLAINT.

Now comes Continental Casualty Company, a corporation, by Heth & Lister and William P. Smith, its attorneys, and not admitting any of the averments contained in the complaint, or any of the counts thereof, but fully reserving its right to deny or answer said averments, if it should be required so to do, moves the Court that the above-entitled cause be dismissed, and for grounds of said motion shows unto the Court that the plaintiffs' complaint is insufficient in law for the following reasons, to-wit:

40 1. That it does not appear from said complaint that there has been any breach of the conditions of the bond sued on in that it does not appear that the Trustee, Howard,

(a) Failed or refused to obey any orders of Court made in relation to the said trust; or

(b) Failed or refused to faithfully and truly account for all moneys, assets, and effects of the estate of said bankrupt, coming to the hands or possession of said Trustee; or

(c) Failed or refused to faithfully perform any of his official duties as such Trustee.

2. Under and by virtue of Title 11, Section 101, U. S. Code (Section 61 of the Bankruptcy Act) the judges of the United

States District Court alone have the power and duty to designate and supervise depositories for the safekeeping of bankruptcy funds, to specify conditions precedent to the designation of such depositories and to revoke such designations. Such judicial authority, once exercised, cannot be reviewed or overruled by a Trustee in Bankruptcy, and such Trustee has the legal right to make a duly designated depository the custodian of all bankruptcy funds in his control until such designation is revoked.

3. Under and by virtue of Title 11, Section 75, U. S. Code, Subhead 3 (Section 47a of Bankruptcy Act) the defendant, Howard, was compelled by law to place all bankruptcy funds in his control in the Phillip State Bank and Trust Company, for it does not appear from any allegation in the complaint that the United States District Court, For the Northern District of Illinois, Eastern Division, ever designated any other depository for bankruptcy funds.

41 4. That there was and is no duty imposed by law upon a trustee in bankruptcy to:

(a) Ascertain the amount of depository bond given by any duly designated depository; or

(b) Ascertain the financial condition of any duly designated depository; or

(c) Ascertain the amount of bankruptcy funds deposited in any duly designated depository by other trustees in bankruptcy; or

(d) Limit his deposits of bankruptcy funds to the amount of the depository bond given by any duly designated depository; or

(e) Limit his deposits so that such deposits, together with deposits of other trustees, do not exceed the depository bond given by any duly designated depository; or

(f) Report to the Court the amount on deposit in any designated depository; or

(g) Report to the Court the financial condition of any depository.

5. It does not appear from any allegation in the complaint that there was any duly designated depository in Cook County, Illinois, other than the Phillip State Bank and Trust Company, wherein the defendant, Howard, as Trustee, could have lawfully deposited bankruptcy funds in his control and where such funds when so deposited, together with, or independent of, bankruptcy funds deposited by other trustees, would not have exceeded the penalty of any depository bond.

6. It is not averred in the complaint that there was any duly designated depository in Cook County, Illinois which appeared in the years 1930 to 1932 to be a safer depository of bankruptcy funds than the Phillip State Bank and Trust Company.

42 7. It does not appear from any averment in the complaint that if the defendant, Howard, as Trustee, had performed all of the duties which it is alleged were imposed on him by law, the losses, as set forth, would not have been sustained.

8. It does not appear from any averment in the complaint that the alleged failure of the defendant, Howard, to perform all of his official duties was the proximate cause of any of the losses sustained.

Wherefore, the defendant, Continental Casualty Company, a corporation, moves that plaintiffs' action may be dismissed as to it; that plaintiff take nothing by its suit and that this defendant go hence without day.

HETH & LISTER,
WM. P. SMITH.

Filed Apr. 1, 1935.

43 And on, to wit, the 1st day of April, 1935 came the defendant, Sam Howard by his attorneys and filed in the Clerk's office of said Court a certain Appearance in words and figures following, to wit:

44 DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44241) * *

I hereby enter the appearance of Sam Howard, one of the defendants, and ourselves as his attorney in the above-entitled cause.

MOSES, KENNEDY, STEIN & BACHRACH,
Defendant's Attorney.

45 And on, to wit, the 2nd day of April, 1935 came the Defendant by his attorneys and filed in the Clerk's office of said Court a certain Motion in words and figures following, to wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Apr. 2, 1935.

(Caption—44241)

MOTION OF SAM HOWARD, TO DISMISS COMPLAINT.

Now comes Sam Howard, By Moses, Kennedy, Stein & Bachrach, his attorneys, and not admitting any of the averments contained in the complaint, or any of the counts thereof, but fully reserving his right to deny or answer said averments, if he should be required so to do, moves the Court that the above entitled cause be dismissed, and for grounds of said motion shows unto the Court that the plaintiffs' complaint is insufficient in law for the following reasons, to-wit:

1. That it does not appear from said complaint that there has been any breach of the conditions of the bond sued on in that it does not appear that the Trustee, Howard,

47 (a) Failed or refused to obey any orders of Court made in relation to the said trust; or

(b) Failed or refused to faithfully and truly account for all moneys, assets, and effects of the estate of said bankrupt, coming to the hands or possession of said Trustee; or

(c) Failed or refused to faithfully perform any of his official duties as such Trustee.

2. Under and by virtue of Title 11, Section 101, U. S. Code (Section 61 of the Bankruptcy Act) the judges of the United States District Court alone have the power and duty to designate and supervise depositories for the safekeeping of bankruptcy funds, to specify conditions precedent to the designation of such depositories and to revoke such designations. Such judicial authority, once exercised, cannot be reviewed or overruled by a Trustee in Bankruptcy, and such Trustee has the legal right to make a duly designated depository the custodian of all bankruptcy funds in his control until such designation is revoked.

3. Under and by virtue of Title 11, Section 75, U. S. Code, Subhead 3 (Section 47a of Bankruptcy Act) the defendant, Howard, was compelled by law to place all bankruptcy funds in his control in the Phillip State Bank and Trust Company, for it does not appear from any allegation in the complaint that the United States District Court, for the Northern District of Illinois, Eastern Division, ever designated any other depository for bankruptcy funds.

48 4. That there was and is no duty imposed by law upon a trustee in bankruptcy to:

(a) Ascertain the amount of depository bond given by any duly designated depository; or

(b) Ascertain the financial condition of any duly designated depository; or

(c) Ascertain the amount of bankruptcy funds deposited in any duly designated depository by other trustees in bankruptcy; or

(d) Limit his deposits of bankruptcy funds to the amount of the depository bond given by any duly designated depository; or

(e) Limit his deposits so that such deposits, together with deposits of other trustees, do not exceed the depository bond given by any duly designated depository; or

(f) Report to the Court the amount on deposit in any designated depository; or

(g) Report to the Court the financial condition of any depository.

5. It does not appear from any allegations in the complaint that there was any duly designated depository in Cook County, Illinois, other than the Phillip State Bank and Trust Company, wherein the defendant, Howard, as Trustee, could have lawfully deposited bankruptcy funds in his control and where such funds when so deposited, together, with, or independent of, bankruptcy funds deposited by other trustees, would not have exceeded the penalty of any depository bond.

49 6. It is not averred in the complaint that there was any duly designated depository in Cook County, Illinois, which appeared in the years 1930 to 1932 to be a safer depository of bankruptcy funds than the Phillip State Bank and Trust Company.

7. It does not appear from any averment in the complaint that if the defendant, Howard, as Trustee, had performed all of the duties which it is alleged were imposed on him by law, the losses, as set forth, would not have been sustained.

8. It does not appear from any averment in the complaint that the alleged failure of the defendant, Howard, to perform all of his official duties was the proximate cause of any of the losses sustained.

Wherefore, the defendant, Sam Howard, moves that plaintiffs' action may be dismissed as to it; that plaintiff take nothing by its suit and that this defendant go hence without day.

SAM HOWARD,
By JULIUS MOSES.
MOSES, KENNEDY, STEIN & BACHRACH.

50 And afterwards, to wit, on the 18th day of April, 1935 being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before Honorable F. A. Geiger District Judge appears the following entry, to wit: Entered Apr. 18, 1935.

51 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44241) * *

Thursday, April 18, 1935.

Present: Honorable F. A. Geiger, Judge of said Court.

This cause coming on to be heard upon the defendants' motion to dismiss the complaint filed herein after arguments of counsel and due deliberation by the Court said motion is overruled and denied and leave be and the same is hereby given the plaintiffs to amend the complaint within ten (10) days from this date.

It Is Further Ordered that the defendants' be and they are hereby required to answer within thirty (30) days to which ruling of the Court the defendants by their attorneys duly except.

52 And on, to wit, the 26th day of April, 1935 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court a certain Amendment to Complaint in words and figures following, to wit: Filed Apr. 26, 1935.

53 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44241) * *

AMENDMENT TO COMPLAINT.

This amendment to complaint is filed by leave of Court first had and obtained.

Amend Counts 1 to 113, inclusive, and section 12 of each of said counts by striking out, in line 5, after the words, "of which said Sam Howard had," the words, "knowledge or which by the exercise of ordinary care he should have known," and substituting therefor the word "notice."

GEORGE B. MCKIBBIN,
WALTER E. BEEBE.

Filed May 27, 1935.

54 And on, to wit, the 27th day of May, 1935, came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Joint and Several Answer in words and figures following, to wit:

55 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * * *

JOINT AND SEVERAL ANSWER OF SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION, DEFENDANTS, TO COMPLAINT AS AMENDED.

Sam Howard and Continental Casualty Company, a corporation, defendants, answering the complaint of the plaintiff as amended in this action:

1. Admit that the defendant, Sam Howard, is a citizen and resident of the County of Cook, State of Illinois, and that the defendant, Continental Casualty Company is and was a corporation of the State of Indiana, doing business in Cook County, Illinois.

2. Admit that the persons, firms and corporations were adjudicated bankrupts by the United States District Court, for the Northern District of Illinois, Eastern Division, on the dates and in the case numbers as alleged in Paragraph 2 of counts 1 to 113, inclusive, of the complaint as amended,

56 and admit that Sam Howard was duly appointed trustee of said bankrupt estates on the dates alleged in the said paragraph of said counts.

3. Admit that the defendant, Sam Howard, duly qualified as such trustee and to insure the faithful performance of his duties, as such trustee, secured, executed and filed with the Clerk of the District Court, bonds with himself as principal and the defendant, Continental Casualty Company, as surety, in the amounts and in the forms as set forth in Paragraph 3 of counts 1 to 113, inclusive, of the complaint as amended, and admit that said bonds were approved by orders of court on the dates as alleged in said paragraph of said counts.

4. Admit that the defendant, Sam Howard, deposited in the Phillip State Bank and Trust Company, in his name as trustee of the particular bankrupt estates, the sums of money and on the dates as alleged in Paragraph 4 of counts 1 to 113, inclusive, of the complaint as amended.

5. Admit that the defendant, Sam Howard, had been elected trustee and appointed receiver in bankruptcy in a number of cases pending in the United States District Court, for the Northern District of Illinois, Eastern Division, and that during the month of August, 1930, commencing on to-wit: August 25, 1930, he deposited in said bank the sum of to-wit: approximately $249,533.32 in various accounts, each in his name as trustee or receiver in bankruptcy for the particular account to which each deposit was made and admit that from August 25, 1930, to June 21, 1932, said defendant, Sam Howard,
57 continued to make deposits to the credit of various bankrupt accounts in the said bank in his name as trustee or receiver in bankruptcy and that the total of all of said deposits varied from month to month from the sum of approximately $241,447.26 to $416,833.90, which latter amount was the total on June 21, 1932.

6. Admit that on June 21, 1932, said Phillip State Bank and Trust Company closed its doors and that a receiver was appointed therefor and that since that date said bank has not reopened and is now in the process of liquidation.

7. Admit that at the time of the closing of said Phillip State Bank and Trust Company, on June 21, 1932, the defendant, Sam Howard, had on deposit in the said bank, to the credit of himself as trustee in bankruptcy of the various persons, firms and corporations, the sums of money as alleged in Paragraph 7 of counts 1 to 113, inclusive, of the complaint as amended.

8. Admit that said Phillip State Bank and Trust Company on August 20, 1930, was designated by the United States District Court, for the Northern District of Illinois, Eastern Division, as an official depository of funds of receivers and trustees of bankrupt estates and on that day executed a depository bond in the penal sum of $50,000.00 to protect the funds belonging to various bankrupt estates deposited in said bank.

9. Admit that upon the failure of said Phillip State Bank and Trust Company there was collected on its depository bond the sum of $50,000.00 from which a distributive dividend of 11.0461% of the amount of each of the various bank-
58 rupt accounts in said bank in the name of Sam Howard as receiver and as trustee in bankruptcy was paid to the said Sam Howard on account thereof, and admit that defendant, Sam Howard, received as a result of said distributive dividend the sums of money as alleged in Paragraph 9, counts 1 to 113, inclusive, of the complaint as amended, which

said amounts were paid over by said Sam Howard to Chester A. Willoughby, successor trustee in bankruptcy.

10. Admit that prior to the month of August, 1930, there were no funds on deposit in the Phillip State Bank and Trust Company to the credit of Sam Howard, as trustee or receiver in bankruptcy, and admit that on August 6, 1930, the defendant, Sam Howard, borrowed the sum of $5,000.00 from the Phillip State Bank and Trust Company on his unsecured note and on August 19, 1930, the further sum of $6,000.00 from said bank on his personal unsecured note and admit that on June 21, 1932, at the time of the closing of said Phillip State Bank and Trust Company, said Sam Howard, was indebted to said bank on his personal unsecured notes in the sum of $17,500.00, but aver that on said dates, defendant, Sam Howard, had on deposit in said bank to his personal credit, the sum of $5,853.63, which said amount, or any part thereof, has never been paid to him by said bank.

11. Admit that said Phillip State Bank and Trust Company was located at the northeast corner of Clark Street and Lunt Avenue, in the City of Chicago, Illinois.

12. Admit that the resignation of Sam Howard as trustee in bankruptcy of the various persons, firms and cor-
59 porations, was accepted on the dates as alleged in Paragraph 15 of counts 1 to 113, inclusive, of the complaint as amended, and admit that Chester A. Willoughby was appointed as trustee in his place and stead and duly qualified as such trustee and ever since has been and now is trustee in bankruptcy of the various persons, firms and corporations, as alleged in said paragraph of said counts.

13. Admit that Chester A. Willoughby, as trustee in bankruptcy of the persons, firms and corporations, as alleged in Paragraph 16 of counts 1 to 113 inclusive, of the complaint as amended, has demanded of the defendants herein the delivery and payment of moneys deposited in said Phillip State Bank and Trust Company to the credit of the various bankrupts, as alleged in said paragraph of said counts and admit that after said demands said defendants, Sam Howard and Continental Casualty Company did not deliver or pay over said moneys, or any part thereof, to said Chester A. Willoughby, as successor trustee in bankruptcy, but aver that said demands were not made until after the resignations of said Sam Howard, as trustee, had been accepted by the United States District Court sitting in Bankruptcy.

14. Deny that a duty rested upon the defendant, Sam

Howard, to keep the deposits made by him in said bank as receiver and as trustee in bankruptcy in a total amount not exceeding the amount of the depository bond, or to keep all of his deposits as receiver and as trustee in bankruptcy so limited that together with all amounts deposited by other receivers and trustees in bankruptcy the total aggregate of all such deposits would not exceed the penal sum of said depository bond.

60 15. Deny that the defendant, Sam Howard, ever, at any time, kept an unreasonably large amount of money in said bank and deny that he was negligent or careless in depositing funds in said bank or maintaining in said bank deposits of bankruptcy funds in excess of the penalty of said depository bond; deny that said Phillip State Bank and Trust Company was a small bank, but aver that these defendants have not sufficient information to form a belief concerning the exact amount of the total deposits or individual demand deposits in said bank, or the amount of government bonds owned by it, or the sums of money due it from other banks, or the amount of cash it had on hand.

16. Deny that between the time of the first deposits by the defendant, Sam Howard, as trustee or receiver in bankruptcy, and the time of the closing of the said bank on June 21, 1932, there were times of heavy withdrawals from said bank, or that its credit became impaired or that it had other financial difficulties and deny that the defendant, Sam Howard, had any notice or knowledge of such alleged conditions, but aver that they do not have sufficient knowledge to form a belief as to whether during said period the total deposits in said bank decreased by more than $1,250,000.00; deny that said Sam Howard was negligent or careless in permitting his bankruptcy funds to remain on deposit in said bank and deny that he was negligent or careless in continuing to deposit bankruptcy funds in said bank or in opening accounts for new estates and deny that ordinary care or prudence would have required that the total of all deposits in said bank of bankrupt estates, by said Sam Howard, did not exceed the amount of the depository bond of $50,000.00.

61 17. Deny that the defendant, Sam Howard, did not faithfully or truly account for all moneys or did not faithfully perform his duties as trustee in bankruptcy of the various estates sued and claimed on in the various counts of the complaint as amended and deny that it was the duty of the defendant, Sam Howard, to report to the courts the amounts

on deposit to his credit as trustee of said estates or to his credit as trustee or receiver in all of the said estates, or the condition of the Phillip State Bank and Trust Company, or to make reports to the court of the additional deposits made by him from time to time, or the withdrawals from or decreases in deposits in said bank, or to report to the court the fact that he had obtained a personal unsecured loan from said bank, or that said loan had from time to time increased and deny that the said Sam Howard did not make all reports to the court which, under the law, it was his duty to make.

18. Deny that by reason of the fact that Sam Howard had an unsecured loan from the said bank, or otherwise, that he did not exercise reasonable care or caution with respect to the amount of moneys deposited by him as receiver or trustee in bankruptcy of various estates and deny that said Sam Howard did not faithfully perform his duties as trustee in bankruptcy of said estates.

19. Deny that by reason of anything in said complaint contained, there is due to the plaintiff, or its relator, from the said Sam Howard, as principal, or from said Continental Casualty Company, a corporation, as surety, the sums of
62 money as claimed in Paragraph 17 of counts 1 to 113, inclusive, of the complaint as amended or any sum of money whatsoever.

Affirmative Defenses.

20. Allege that there was, on August 20, 1930, and at all times since, in full force and effect, a certain statutory provision of the United States of America, namely, Section 75, Title 11, of the United States Code, providing as follows:

"Trustees shall, respectively * * * (3) deposit all moneys received by them in one of the designated depositories * * *"; that by virtue of said statutory provision, the defendant, Sam Howard, was obligated to put all bankruptcy funds coming into his possession, as trustee in bankruptcy, in a depository designated by the District Court and was depriyed of all right and discretion to choose the place of deposit for such bankruptcy funds.

21. Allege that there was on August 20, 1930, and at all times since, in full force and effect, a certain statutory provision of the United States of America, namely, Section 101, Title 11, U. S. Code, providing as follows:

63 "Depositories for Money. Courts of bankruptcy shall designate, by order, banking institutions as depositories

for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.";

that by virtue of said statute, the judges of the United States District Court, for the Northern District of Illinois, Eastern Division, alone had the power and duty to designate and supervise depositories for the safekeeping of bankruptcy furds, to specify conditions precedent to the designation of such depositories and to revoke such designations; that pursuant to such power and duty, the said United States District Court did, on August 20, 1930, designate the Phillip State Bank and Trust Company as a depository of bankruptcy funds and on said day entered the following order, to-wit:

64 "IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

In the Matter of the Petition of
Phillip State Bank and Trust Company, of Chicago, Illinois, to be designated by the Court as a Depository for the Money and Funds of Bankrupt Estates.

ORDER.

This cause coming on to be heard on the petition of Phillip State Bank and Trust Company, of the City of Chicago, County of Cook and State of Illinois, to be designated as a Depository of money and funds of bankrupt estates, and upon reading the verified petition the Court, on the faith of the representations made in said petition, makes the following order:

It Is Hereby Ordered, Adjudged and Decreed that Phillip State Bank and Trust Company, of Chicago, Illinois, upon the approval of this Court of a good and sufficient bond, be designated and qualified as a Depository of money and funds of bankrupt estates.

And now Phillip State Bank and Trust Company, having

offered its bond in open court, said bond being in the sum of Fifty Thousand Dollars ($50,000.00) and said bond being signed by said Phillip State Bank and Trust Company, as Principal, and the Fidelity and Deposit Company of Maryland, as surety, It Is Hereby Ordered, Adjudged and Decreed that said bond is hereby accepted and approved and that said Phillip State Bank and Trust Company is hereby appointed and designated as a Depository for the money of bankrupt estates.

Enter:

CARPENTER,
Judge."

65 that said Order remained in full force and effect from the date of its entry to and including June 21, 1932, and that the same was not appealed from, reversed or in any way modified by the District Court of the United States, for the Northern District of Illinois, Eastern Division, or by any court having appellate jurisdiction thereof; that by said Order, it was determined that the said Phillip State Bank and Trust Company was a fit and proper place for the deposit of bankruptcy funds and would continue so to be as long as said Order remained unchanged and in full force and effect; that by virtue of said Order and said statutory provisions herein referred to, the defendant, Sam Howard, was relieved of all duty to investigate or determine the stability of said Phillip State Bank and Trust Company or to ascertain the amount of bankruptcy funds deposited in said bank by other receivers or trustees in bankruptcy, or to limit his deposits of bankruptcy funds to the amount of the depository bond given by said bank or to limit his deposits so that such deposits, together with deposits of other receivers and trustees, did not exceed the depository bond given by said bank, or to report to the court the amount that he or other receivers or trustees had on deposit in said bank, or to report to the court the financial condition of said bank, or of his personal business transactions therewith.

22. Allege that although there was no duty imposed by law upon him so to do, the defendant, Sam Howard, did investigate the financial condition of the Phillip State Bank and Trust Company and did at all times exercise due care and caution in ascertaining the stability of said bank and the

66 security of bankruptcy funds deposited by him in the same; that is to say, he did the following, to-wit:

(a) Made inquiries from time to time, during the period of

August 25, 1920, to June 21, 1932, of the President of said Phillip State Bank and Trust Company and of officials of the Central Trust Company of Illinois (a large loop bank) as to the financial condition of said Phillip State Bank and Trust Company, and was at all times informed by them that the said bank was in excellent financial condition and would be supported, if any need arose, by the said Central Trust Company, and was given a copy of a letter dated June 12, 1931, written by the President of the Central Trust Company to the President of said Phillip State Bank and Trust Company, which was intended to assure depositors of the said Phillip State Bank and Trust Company of the safety of their deposits, which letter was in words and figures as follows:

"Central Trust Company of Illinois
208 South La Salle Street
Chicago

June 12, 1931.

Philip R. Clarke
President
C. A. Beutel, Esq., President,
Phillip State Bank & Trust Company,
7001 North Clark Street,
Chicago.

Dear Mr. Beutel:

We are cooperating with the loop banks in sending millions of dollars to the outlying banks, and are prepared to lend them further support consistent with sound banking
67 practice.

Fortunately, the public seems to realize that many of these banks are able to take care of their own needs, and are in sound condition. In this emergency we are glad to lend our support if needed to the Phillip State Bank and Trust Company.

Cordially yours,
Signed—PHILIP R. CLARKE,
President."

PRC-P

(b) Ascertained that the said Central Trust Company of Illinois, whenever requested, had loaned and was continuing to loan its full support to the said Phillip State Bank and Trust Company.

(c) Ascertained that the State Auditor of Illinois and auditors of the Chicago Clearing House Association had,

from time to time, between August 20, 1930, and June 21, 1932, made examinations of the said Phillip State Bank and Trust Company, and that upon such examinations said bank was found to be in such condition that no action was taken or necessary to be taken to suspend the right of said bank to do business or to suspend it as a member of the Chicago Clearing House Association.

(d) From time to time during the period of August 25, 1930, to June 21, 1932, made written reports to the Clerk of the United States District Court and written and oral reports to the United States District judges and referees in Bankruptcy as to the amount of bankruptcy funds he had on deposit in the said Phillip State Bank and Trust
68 Company and ascertained that subsequent to such re-
ports no order was entered by said District Court alter-
ing or revoking the designation of said bank as a depository of bankruptcy funds or increasing the amount of its depository bond or in any way limiting the amount of the depository funds to be deposited therein.

22. Allege that during the period of August 20, 1930, to June 21, 1932, and for a long time prior thereto, it was a general custom among persons administering estates in bankruptcy, as trustees or receivers thereof, in the Northern District of Illinois, Eastern Division, to advance from their own funds, or from funds borrowed by them for that purpose, sufficient cash to defray the operating expenses of various estates wherein no cash came at once to the hands of such trustees or receivers, and wherein immediate funds were necessary for the purpose of paying fees of custodians, insurance, wages and salaries of employees and other current operating expenses; and likewise, to advance from their own funds, or from funds borrowed by them for that purpose, cash to defray operating expenses of bankrupt estates being administered by them so as to avoid the inconvenience, delay and expense of making frequent applications to the Court to obtain orders authorizing the payment of such expense out of bankruptcy funds in their control, and the counter-signature of checks for that purpose; and then at the closing of each bankrupt estate, wherein such advances had been made, to petition the court for reimbursement therefor; that such custom was and had been recognized by the Judges of the District Court, for the Northern District of Illinois, sit-
69 ting in Bankruptcy and by the Referees in Bankruptcy in said District, and permitted by them to be followed;

that in common with other trustees and receivers in bankruptcy, the defendant, Sam Howard, followed said custom, and had, from time to time, borrowed funds for the purpose of defraying operating expenses of those estates administered by him in which no immediate cash was available, and also for the purpose of avoiding the inconvenience, delay and expense of making frequent applications to the Court to authorize payment of operating expenses, and was, in the month of August, 1930, indebted to the Central Trust Company of Illinois in the sum of $2,500.00 and to the Foreman National Bank and Trust Company in the sum of $7,000.00 for moneys borrowed by him for such purposes; that on to-wit: August 6, 1930, defendant, Sam Howard, obtained a loan of $5,000.00 and on August 19, 1930, a loan of $6,000.00 from Phillip State Bank and Trust Company, out of which sums he repaid the said loans of $2,500.00 to Central Trust Company of Illinois and $7,000.00 to Foreman National Bank and Trust Company; that the balance of said loans and all further loans obtained by the said Sam Howard from the said Phillip State Bank and Trust Company, between August, 1930, and the closing of said bank, were for the purposes of defraying the operating expenses of bankrupt estates administered by him; that at the time of the closing of the said Phillip State Bank and Trust Company on to-wit: June 21, 1932, there was due and owing to the said defendant, Sam Howard, from the bankrupt estates, for moneys advanced by him for the purpose of defraying the expenses thereof, a sum of money in excess of the sum owed by the said Sam Howard to the said Phillip State Bank and Trust Company, for which amount said defendant, Sam Howard, was and is
70 entitled to reisbursement out of the said bankrupt estates administered by him.

SAM HOWARD,
By MOSES, KENNEDY, STEIN & BACHRACH
By Moses, Kennedy, Stein & Bachrach
His attorneys.

CONTINENTAL CASUALTY COMPANY,
a corporation
By HETH & LISTER
By LLOYD D. HETH
WM. P. SMITH
Its attorneys.

Entered Aug. 6, 1935.

71 And afterwards, to wit, on the 6th day of August, 1935, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

72 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

ORDER ASSIGNING CASE.

It Is Ordered that the above entitled cause be and the same is hereby assigned to Judge Geiger.

WILKERSON

Chicago, Aug. 6, 1935.

Filed Sept. 7, 1935.

78 And on, to wit, the 7th day of September, 1935 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

74 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

ANSWER OF PLAINTIFF TO THE AFFIRMATIVE DEFENSES OF THE DEFENDANTS.

The plaintiff answering says:

20. Plaintiff admits the allegations of paragraph 20 and that the statute therein referred to was in force in the United States of America during all times mentioned in said Complaint as amended, and that there was a requirement upon Sam Howard as Trustee to place his funds in a depository designated by the United States District Court.

21. Plaintiff admits that there was, on August 20, 1930, and at all times since has been in full force and effect, the provision of the statute therein referred to, and that the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, had the power to designate depositories for the safekeeping of bankruptcy funds, and that said Court did, on August 20, 1930, enter the order

set forth in paragraph 21, and that said order remained in full force and effect to and including June 21, 1932. As
75 to all of the remaining allegations in said paragraph 21, plaintiff expressly denies each and every such allegation and conclusions drawn therefrom.

22. Plaintiff denies the allegations of the first sentence of paragraph 22.

(a) Plaintiff has no knowledge of any inquiries that were made by the said Sam Howard of the President of said Phillip State Bank and Trust Company and of officials of the Central Trust Company of Illinois, but states that if such inquiries were made, as set forth in paragraph 22 (a), and if the said letter of Philip R. Clarke, therein referred to, was shown to the said Sam Howard, such information and such letter was in and of itself notice to the said Sam Howard that the condition of the said Phillip State Bank and Trust Company was unsatisfactory, and that upon the receipt of such information and upon receipt of notice of such letter, it was the duty of the said Sam Howard as Trustee or Receiver to take suitable action to protect his deposits as Receiver or Trustee in Bankruptcy.

(b) Plaintiff denies the allegations of paragraph 22 (b).

(c) Plaintiff has no knowledge sufficient to form a belief that examinations were made by the State Auditor of Illinois and auditors of the Chicago Clearing House Association of the Phillip State Bank between August 20, 1930 and June 21, 1932, but states that if any such examinations were made during said period of time of the said Phillip State Bank and Trust Company, such examinations would show said bank to be in an unsafe condition for the deposit of such sums of money as the said Sam Howard had deposited to the credit of bankrupt estates.

(d) Plaintiff admits that written reports were made
76 between August, 25, 1930 to June 21, 1932 by the said Sam Howard as Receiver and as Trustee in Bankruptcy as to the amounts on hand in various bankrupt estates, but denies that any report or reports were made as to the total moneys in all bankrupt estates deposited in said Phillip State Bank by the said Sam Howard or that any report was made to the Court indicating the condition of the said Phillip State Bank and Trust Company, the amount of its deposits, the runs on said bank, the reduction in the general deposits in said bank, the increases in the deposits of the said Sam

Howard as Receiver or Trustee in Bankruptcy, the personal loans of the said Sam Howard at the time of the initial deposits, or the increase in the amount of such personal loans from time to time as the deposits of the said Sam Howard as Receiver or Trustee in Bankruptcy increased. Plaintiff further states that at no time was a written or oral report ever made to the Court which disclosed the entire situation as to the total deposits of the said Sam Howard as Receiver or Trustee in Bankruptcy in the Phillip State Bank and Trust Company.

23. Plaintiff admits the allegations of paragraph 23, in so far as the same set forth the loans of Sam Howard from the Phillip State Bank and Trust Company but has no knowledge sufficient to form a belief as to the indebtedness of the said Sam Howard in August, 1930, to the Central Trust Company and to the Foreman National Bank and Trust Company. As to the remaining allegations in said paragraph, plaintiff expressly denies each and every allegation and expressly denies that any such general customer existed as alleged in said paragraph.

UNITED STATES OF AMERICA, on relation of CHESTER A. WILLOUGHBY, as Trustee in Bankruptcy of NATIONAL MECHANICAL SERVICE COMPANY, a corporation, et al.,

By THURLOW G. ESSINGTON
GEORGE B. McKIBBIN
WALTER E. BEEBE
Attorneys.

ESSINGTON & McKIBBIN
Attorneys for Plaintiff.

77 And afterwards, to wit, on the 16th day of September, 1935, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable F. A. Geiger, District Judge, appears the following entry, to wit:

78 IN THE DISTRICT COURT OF THE UNITED STATES. Entered Sept. 16, 1935.

* * (Caption—44241) * *

Monday, September 16, 1935.

Present: Honorable F. A. Geiger, Judge of said Court.

This day come the defendants by their attorneys and enter herein their motion to dismiss the complaint as amended which motion is overruled and denied to which ruling of the Court the defendants by their attorneys duly except, and on motion of the parties

It Is Ordered that this cause together with Cause No. 44270 be consolidated with Cause No. 43996 for trial.

79 And afterwards, to wit, on the 19th day of September, 1935, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable F. A. Geiger, District Judge, appears the following entry, to wit: Entered Sept. 19, 1935.

80 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

Thursday, September 19, 1935.

Present: Honorable F. A. Geiger, Judge of said Court.

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore impanelled for the trial of said cause also come and this cause having been heretofore consolidated with Causes No. 43066 and No. 44270, and thereupon at close of all the evidence the defendants by their attorneys renew their motion to exclude all the testimony and for a directed verdict which motion is overruled and denied to which ruling of the Court the defendants by their attorneys duly except, and the Jury having heard the evidence by the parties adduced arguments of counsel and charge of the Court retire to their rooms to consider of their verdict with sworn Bailiffs and afterwards return into open Court and render their verdict and upon their oath do say: We, the Jury, find the issues for the Plaintiffs and assess

the plaintiffs' damages at the sum of One Hundred Ninety-seven Thousand Seventy-six Dollars and 31/100 ($197,076.31). Whereupon the defendants by their attorneys enter herein their oral motion for a new trial in said cause which motion is entered with leave to file written motion in five (5) days and cause continued for disposition of said motion.

Entered Sept. 19, 1935.

81 And on, to wit, the 19th day of September, 1935, there was filed in the Clerk's office of said Court a certain VERDICT in words and figures following, to wit:

82 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

We, the Jury, find the issues for the Plaintiffs and assess the Plaintiffs damages as against the Defendants in the sum of One Hundred Ninety-seven Thousand and Seventy-six Dollars and thirty-one Cents. ($197,076.31)

H. B. DAVIS,
Foreman.
GEORGE L. POUNDSTONE,
HAROLD W. WING,
EDGAR M. ANDERSON,
JOHN J. RYAN,
LUKE J. CONNELLY,
WILLIAM P. POWERS,
ALGERNON B. WINBORN,
OSWALD BROD,
JAMES A. BOWE,
ESBERN NIELSEN,
CLYDE A. SELIX.

83 And afterwards, to wit, on the 24th day of September, 1935, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson District Judge appears the following entry, to wit:

84 IN THE DISTRICT COURT OF THE UNITED STATES. Entered Sept. 24, 1935.
* * (Caption—44241) * *

ORDER.

This cause having come on to be heard this 24th day of September, 1935, upon the agreement of the parties hereto, by their respective attorneys, that the following order may be entered,

It Is Ordered, Adjudged and Decreed: that the time for the defendants within which to file their written motion for new trial be and the same is hereby extended to and including the 2nd day of October, 1935.

Enter:

JAMES H. WILKERSON,
Judge.

We consent to the entry of the above order.
ESSINGTON & MCKIBBEN,
Attorneys for Plaintiff.
HETH & LISTER,
W. G. SMITH,
Attorneys for Continental Casualty Co.
MOSES, KENNEDY, STEIN & BACHRACH,
Attorneys for Sam Howard.

85 And afterwards, to wit, on the 2nd day of October, 1935, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson District Judge appears the following entry, to wit: Entered Oct. 2, 1935.

86 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44241) * *

ORDER.

By agreement of counsel for plaintiffs and the defendants herein, It Is Hereby Ordered, Adjudged and Decreed that the motion for new trial filed this day on behalf of the defendants in the case of United States of America *ex rel.* Chester A. Willoughby, as trustee in bankruptcy of Bennett's, Inc., a corporation, Bankrupt, *vs.* Sam Howard and Continental

Casualty Company, a corporation, #43996, be considered as the motion for new trial of defendants in this cause with the same force and effect as if said written motion for new trial had been filed herein on this date.

Enter:

JAMES H. WILKERSON,
Judge.

Agreed to by:
ESSINGTON & MCKNIGHT,
Attorneys for Plaintiffs.
MOSES, KENNEDY, STEIN & BACHRACH,
HETH & LISTER,
WM. P. SMITH,
Attorneys for Defendants.

Filed Jan. 18, 1936.

87 And on, to wit, the 18th day of January, 1936, came the parties by their attorneys and filed in the Clerk's office of said Court a certain Stipulation in words and figures following, to wit:

88 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the parties hereto that the Clerk shall not incorporate in the transcript of record in the above cause the defendants' motion for new trial filed October 2, 1935, it being hereby agreed that said motion is identical with the motion for new trial in cause #43996 entitled United States of America, on relation of Chester A. Willoughby, as Trustee in Bankruptcy of Bennett's, Inc., a corporation, plaintiffs, *vs.* Sam Howard and Continental Casualty Company, a corporation, defendants, to be set forth in extenso in the transcript of record to be prepared by the Clerk in said cause for use by the Circuit Court of Appeals and that said Clerk shall insert in the transcript in this cause this stipulation in lieu of said motion for new trial.

And the Said Parties Hereto Agree that the incorporation of this stipulation in said transcript of record shall have the same force and effect as though said motion for new trial contained in the transcript of record in cause #43996 were incorporated in the transcript of record in this cause and shall

be considered by the Circuit Court of Appeals as the motion for new trial in this cause.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for Plaintiff.
JULIUS MOSES,
Attorney for Sam Howard, Defendant.
LLOYD D. HETH,
WM. P. SMITH,
Attorneys for Defendant Continental Casualty Company.

89 And afterwards, to wit, on the 18th day of January, 1936, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable F. A. Geiger, District Judge, appears the following entry, to wit: Entered Jan. 18, 1936.

90 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

ORDER.

This cause having come on to be heard this 18th day of January, 1936, it is by agreement of the parties hereto,

Ordered that the stipulation of the parties hereto filed herein this day, with respect to the exclusion from the transcript of record in this cause of the motion for new trial in this cause, and the substitution thereof in said transcript of record of said stipulation in respect thereto, be and the same is hereby approved.

Enter:

F. A. GEIGER,
Judge.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for Plaintiffs.
JULIUS MOSES,
Attorney for Defendant Sam Howard.
LLOYD D. HETH,
WM. P. SMITH,
Attorneys for Defendant Continental Casualty Company.

Entered Oct. 18, 1935.

91 And afterwards, to wit, on the 18th day of October, 1935, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable F. A. Geiger, District Judge, appears the following entry, to wit:

92 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

ORDER.

At Chicago, Illinois, in said District, this cause having come on to be heard this 16th day of October, A. D. 1935, upon the written motion of the defendants, and each of them, filed herein, for a new trial as to said defendants, and each of them, and the court having considered the said motion for new trial and the arguments of counsel in support thereof, and being fully advised in the premises,

Doth Order, Adjudge and Decree: that the said motion of the said defendants, and each of them, for new trail, be and the same is hereby overruled, to which action of the court the said defendants, and each of them, except, which exceptions are hereby allowed.

93 And thereupon the defendants, and each of them, having moved the court to enter a judgment on their behalf and on behalf of each of them, notwithstanding the verdict of the jury, and the court having heard and considered said motion and the arguments in support thereof,

Doth Order, Adjudge and Decree: that the same be and it is hereby overruled, to which action of the court the said defendants, and each of them, except, which exceptions are hereby allowed.

And thereupon the defendants, and each of them, having moved the court for a judgment in their favor in arrest of the judgment about to be entered upon said verdict and notwithstanding the verdict of the jury, and the court having fully considered said motion,

Doth Order, Adjudge and Decree: That the same be and it is hereby overruled, to which action of the court the defendants, and each of them, except, which exceptions are hereby allowed.

Now, Therefore, It Is Ordered, Adjudged and Decreed: That the plaintiff have and recover of the defendants, the

sum of One Hundred Ninety Seven Thousand Seventy Six Dollars and Thirty-one Cents ($197,076.31), together with the costs of said cause and have execution therefor, to all of which the defendants, and each of them, except, which exceptions are hereby allowed.

On motion of the defendants, and each of them, the cause is hereby continued to and including December 1, 1935, for
94 the purpose of presenting, settling, signing and filing their bills of exceptions in this cause and the term is hereby extended accordingly, and the time within which the defendants may present, have settled, signed and filed their bills of exceptions herein is hereby extended to and including December 1, 1935.

Enter:

F. A. GEIGER,
Judge.

Approved as to form:
GEORGE B. MCKIBBIN,
HAMILTON K. BEEBE,
WALTER E. BEEBE,
Attorneys for Plaintiff.
MOSES, KENNEDY, STEIN & BACHRACH,
Attorneys for Sam Howard.
LLOYD D. HETH,
WM. P. SMITH,
Attorneys for Continental Casualty Co.

95 And on, to wit, the 29th day of November, 1935, came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Bill of Exceptions in words and figures following, to wit:

Bill of Exceptions filed Nov. 29, 1935.

96 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

BILL OF EXCEPTIONS.

Filed Nov. 29, 1935.

and Order approving same entered Nov. 29, 1935.

Entered Nov. 29, 1935.

F. A. GEIGER,
Dist. Judge.

99 Bill of Exceptions.

Be It Remembered, that heretofore, to-wit, on the 16th day of September, A. D., 1935, the same being one of the judicial days of the September, A. D., 1935, term of this Court, at Chicago in said District and Division aforesaid, the above-entitled cause came on for trial before the Honorable Ferdinand A. Geiger, sitting by special designation in this case as a Judge of the United States District Court in and for the District and Division aforesaid, and before a jury; whereupon the following testimony was taken and proceedings had:

Appearances:

Messrs. George B. McKibbin and Walter E. Beebe, and Hamilton K. Beebe, Attorneys, on behalf of the plaintiffs.

Mr. Julius Moses, Attorney on behalf of the Defendant, Sam Howard.

Messrs. Lloyd D. Heth and William P. Smith, Attorneys on behalf of the defendant, Continental Casualty Company.

The defendants renewed their motion to dismiss the complaint as amended and moved the Court to dismiss the
100 complaint as finally amended on the grounds as previously stated in its said motion to dismiss, upon consideration of which the court overruled the same, to which ruling of the court the defendants excepted, which exception was allowed.

Thereupon it was stipulated, agreed and ordered that the cases of United States of America, *ex rel.* Chester A. Wil-

loughby, as trustee in bankruptcy of Bennett's, Inc., a corporation, bankrupt, *vs.* Sam Howard and Continental Casualty Company, No. 43996, and United States of America, *ex rel.* Chester A. Willoughby, as trustee in bankruptcy of National Mechanical Service Company, a corporation, bankrupt, *et al.*, *vs.* Sam Howard and Continental Casualty Company, No. 44241, and United States of America on relation of Chester A. Willoughby, as trustee in bankruptcy of Eli Lande and Morris Lande, individually and as co-partners, trading as Lande Brothers, *et al.*, *vs.* Sam Howard and Continental Casualty Company, No. 44270, be consolidated for trial and heard together, the above-styled cause being one of said cases.

Thereupon a jury was selected, impanelled and sworn.

Thereupon the plaintiffs, to maintain the issues in their behalf, introduced the following evidence, to-wit:

The plaintiffs offered in evidence the form of trustee in bankruptcy's bond, being a copy of the trustee's bond executed in the case of Bennett's Inc., the funds of which estate are involved in one of these three suits, which form of trustee's bond so offered was received in evidence as PLAINTIFF'S EXHIBIT 1 and is in words and figures as follows, to-wit:

101 PLAINTIFF'S EXHIBIT 1.

The Continental
Casualty Company
General Office: Chicago

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

In the Matter of
Bennett's, Inc., a corporation,
Bankrupt. } In Bankruptcy

Know All Men by These Presents, That We, Sam Howard, of Chicago, Illinois, as Principal, and Continental Casualty Company, a corporation organized and existing under the laws of the State of Indiana, and having an office and principal place of business at No. 910 South Michigan Avenue, City of Chicago, County of Cook, and State of Illinois, as surety, are held and firmly bound unto the United States of

America, in the sum of Fifteen Thousand ($15,000.00) Dollars, in lawful money of the United States, to be paid to the said United States; for which payment well and truly to be made, we bind ourselves, and our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

Signed and sealed this 24th day of June, A. D. 1930

The Condition of This Obligation Is Such, That whereas the above-named Sam Howard was on the 19th day of June, A. D. 1930, appointed Trustee in the case pending in Bankruptcy in said Court, wherein Bennett's, Inc., a corporation, is the Bankrupt, and he, the said Sam Howard, has accepted said trust with all the duties and obligations pertaining thereunto;

Now, Therefore, If the said Sam Howard, Trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said Bankrupt, which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Witness:

SAM HOWARD (L. S.)
CONTINENTAL CASUALTY COMPANY.
By JOHN H. R. JAMAR
Attorney(s)-in-fact.

(Seal)

Approved:
HARRY A. PARKIN
Referee in Bankruptcy
24—June—1930

102 Thereupon it was stipulated and agreed that this was the bond executed by the defendant, Sam Howard, as principal, and Continental Casualty Company, as surety, in case No. 43996 by the defendants Sam Howard and the Continental Casualty Company, wherein funds of the estate of Bennett's, Inc., are involved, and that the same form of bond, containing the same terms and conditions except as to the amounts thereof, the dates thereof and the dates referred to and mentioned therein and the estates mentioned and designated therein, were executed by the defendants, Sam Howard, as principal, and Continental Casualty Company, as surety, in all of the 113 estates which are included under case No. 44241.

Thereupon it was stipulated and agreed that the amount on deposit in the Phillips State Bank to the credit of Sam Howard, as trustee of the Estate of Bennett's, Inc., at the time said bank closed was $5,489.22, after taking credit for a dividend received by said estate from the depository bond of said bank.

Thereupon the plaintiffs offered in evidence a document, being a list showing the respective amounts of the trustee's bonds executed in the estates involved in case No. 44241 and showing the balance on deposit in the Phillips State Bank and Trust Company to the credit of Sam Howard as trustee of said respective estates as of the date of the closing of said bank, after having credited said balance so on deposit with dividends received by said estate from the proceeds received from the depository bond; and thereupon said document so offered was received in evidence as PLAINTIFF'S EXHIBIT 2 and is in words and figures as follows, to-wit:

103 PLAINTIFFS' EXHIBIT 2.

9/16/35

* * (Caption—44241) * *

Count	Name	Net Amount on Deposit	Bond	Amount Claimed
1	National Mechanical Service Company, a corporation	$ 2,150.24	$ 2,000.00	$ 2,000.00
2	A. H. Abbott & Co., a corporation	2,496.41	2,500.00	2,496.41
3	Acme Oil Corporation, a corporation	651.69	500.00	500.00
4	Advertising Displays, Inc., a corporation	1,926.55	4,500.00	1,926.55
5	Ajax Furniture Co., a corporation	968.06	1,000.00	968.06
6	John Schroeder and Edna J. Schroeder, individually, and as copartners, doing business as Albany Park Heating Co.	495.99	1,000.00	495.99
7	Albert Anderson and Lillian Anderson, individually, and as copartners, doing business as Albert Anderson	303.38	200.00	200.00
8	Anderson Jewelry Co., a corporation	4,084.19	5,000.00	4,084.19
9	Architectural Tiling and Mosaic Company, Inc., a corporation	871.35	2,000.00	871.35
10	Ben Babel	825.11	1,500.00	825.11
11	Edward C. Becker	272.95	500.00	272.95
12	E. J. Biggs, doing business as Biggs Construction Company	850.41	1,000.00	850.41
13	Henry H. Brown Cabinet Company, a corporation	648.06	1,000.00	648.06
14	Burr Veck Company, a corporation	3,231.75	2,000.00	2,000.00
15	S. S. Chevlen Co., Inc., a corporation	70.36	1,000.00	70.36
16	Chicago Brass Works, a corporation	574.98	500.00	500.00
17	Cicero Furniture House, Inc., a corporation	2,178.29	1,500.00	1,500.00

Count	Name	Net Amount on Deposit	Bond	Amount Claimed
18	John W. Bentley Company, a corporation	330.18	500.00	330.18
19	Ely Blechman	328.78	100.00	100.00
20	Harry Blumenschein	302.45	2,500.00	302.45
21	Harry Chavis, Trading as Belmont Shoe Store	1,747.43	2,500.00	1,747.43
22	Signe Chouinard	552.05	1,000.00	552.05
23	Diamond Iron and Metal Company, a corporation	726.37	1,500.00	726.37
24	W. I. Draper and Co., (William I. Draper, individually, and doing business as W. I. Draper and Co.)	88.95	500.00	88.95
25	Eagle Metalware Manufacturing Company, a corporation	3,530.88	8,000.00	3,530.88
26	Froehling and Heppe Co., a corporation	207.67	500.00	207.67
27	Abraham Furman, doing business as G. and F. Bootery	1,228.29	2,000.00	1,228.29
104				
28	Gatziolis Bros., Inc., a corporation	1,364.16	1,000.00	1,000.00
29	Goldman Bond and Mortgage Co., a corporation	521.45	1,000.00	521.45
30	Hatch Sattley, Inc., a corporation	2,187.13	5,000.00	2,187.13
31	Bert Hamburger, individually, and doing business as Phyllis Shop	728.78	1,000.00	728.78
32	Sarah D. Hoffman, doing business as The Grove Style Shop	14.01	500.00	14.01
33	Hans N. Jepsen	457.66	2,000.00	457.66
34	Irving Kaplan, doing business as Kaplan's Millinery	184.20	1,500.00	184.20
35	Peter M. Cibulskis	193.12	500.00	193.12
36	The Club Managers Service Corp., a corporation	298.53	500.00	298.53
37	Coffee Dan's, Inc., a corporation	572.15	1,000.00	572.15
38	Cole and Dunas Music Co., a corporation	2,457.15	3,000.00	2,457.15
39	Cunningham System, Inc., a corporation	1,906.79	3,500.00	1,906.79
40	Alfonso Fiorentini, doing business as Italian Sausage Works	19.29	200.00	19.29
41	Samuel Friedman, trading as The Gem Box and Kiddies Kloes Shop	206.18	1,000.00	206.18
42	James M. Goodell, Jr., Inc., a corporation	222.38	1,000.00	222.38
43	Harry Lapping and Max Janosky, individually, and as copartners doing business as George's Cloak and Suit Co.	1,521.80	2,500.00	1,521.80
44	Harrison's Orange Huts, Inc., a corporation	675.34	1,000.00	675.34
45	Janows and Kramer Co., a corporation	5,303.61	5,000.00	5,000.00
46	Leo Klier	3,193.72	3,500.00	3,193.72
47	Max J. Lang	315.24	2,000.00	315.24
48	Lenora Products Co., a corporation	194.81	1,000.00	194.81
49	M. W. Lorch, Inc., a corporation	1,189.93	3,000.00	1,189.93
50	Stanley Mruk	189.09	200.00	189.09
51	Gaston L. Alciatore, doing business as Louisiane Restaurant	802.86	1,000.00	802.86
52	Carterville and Herrin Coal Co., a cor-			

Count	Name	Net Amount on Deposit	Bond	Amount Claimed
	poration	2,339.90	10,000.00	2,339.90
53	—Albert G. Hanisch and Elsie M. Yost, individually, and as copartners, doing business as Hanisch and Yost	1,808.38	1,500.00	1,500.00
54	—Hafner Chevrolet Company, a corporation	6,162.82	5,000.00	5,000.00
55	—Wladyslaw Lewandowski, also known as Walter Lewandowski	855.57	3,000.00	855.57
56	—McCoy Schulten Company, a corporation	4,717.68	5,000.00	4,717.68
57	—Marine Dredge and Gravel Company, a corporation	176.81	1,000.00	176.81
58	—Walter H. Merker	538.43	1,000.00	538.43
59	—Major Isaacson, doing business as Major Paint Store	203.95	200.00	200.00
60	—A. B. C. Tire and Rubber Company, a corporation	16.40	2,000.00	16.40
61	—A. F. Beard, doing business as Direct Sales and Service Co.	30.84	16,000.00	30.84
105				
62	—Sam Cherry	5.79	500.00	5.79
63	—Cook, Thomas and Cash, Inc., a corporation	78.72	500.00	78.72
64	—Earl DeYoung and Company, a corporation	1,551.08	3,000.00	1,551.08
65	—Harry Graff, Inc., a corporation	421.43	20,000.00	421.43
66	—Donald R. Kimbark, Inc., a corporation	7,261.27	5,000.00	5,000.00
67	—Kolax Company, Inc., a corporation	60.09	1,000.00	60.09
68	—Edward I. Leibow	200.40	10,000.00	200.40
69	—National Theatres Corporation, a corporation	46,410.96	1,000.00	1,000.00
70	—Ida Nauman, doing business as Sydelle Dress Shop	999.91	1,500.00	999.91
71	—North Shore Tile Company, a corporation	400.80	200.00	200.00
72	—Oro Tone Company, a corporation	2,800.20	2,500.00	2,500.00
73	—Bernard Osberg	165.16	1,500.00	165.16
74	—Peerless Piston Ring Mfg. Co., Inc., a Corporation, also trading under the name of Accurate Auto Parts Corp.	1,508.21	4,000.00	1,508.21
75	—Mrs. Phillips Home Made Candies, Inc., a corporation	2,425.45	3,000.00	2,425.45
76	—Phoenix Coal and Coke Co., a corporation	1,651.27	1,000.00	1,000.00
77	—Piccadilly Pharmacy, Inc., a corporation	2,539.82	1,000.00	1,000.00
78	—Phillip Price, doing business as The Leading Tailors	9.89	1,000.00	9.89
79	—Maurice A. Price & Louis A. Price, ind. and as copartners, d. b. as Price Brothers	2,510.29	2,000.00	2,000.00
80	—Edward A. Ramsten	75.16	1,000.00	75.16
81	—Reback, Inc., a corporation	12,942.88	15,000.00	12,942.88
82	—Hyman Resnikoff and David Alberts, individually, and as copartners doing business as Resnikoff and Alberts	456.24	500.00	456.24
83	—W. H. Rogers Company, a corporation	6,610.17	5,000.00	5,000.00
84	—L. Rosen, doing business as Roselawn Baby Store	6.96	1,500.00	6.96

Count	Name	Net Amount on Deposit	Bond	Amount Claimed
85	H. R. Rosenbaum Co., a corporation	28,124.17	30,000.00	28,124.17
86	Simon J. Rosenthal, doing business as Sheridan Vogue Shop	59.37	500.00	59.37
87	Sall Mountain Company, a corporation	5,678.56	10,000.00	5,678.56
88	Schack Artificial Flower Company, a corporation	10,186.82	10,000.00	10,000.00
89	Walter E. Schumuckal	509.67	1,000.00	509.67
90	C. W. Schneider	177.90	200.00	177.90
91	C. A. Smid, individually, and doing business as C. A. Smid and Company	3,421.16	2,000.00	2,000.00
92	Southwest Lumber Company, a corporation	1,515.51	2,000.00	1,515.51
93	Spertus, Inc., a corporation	660.69	1,500.00	660.69
94	Harry Gravier, Morris Gertler and Fannie Goldstein, individually and as copartners, doing business as a Standard Parlor Furniture Company	2,645.57	2,500.00	2,500.00
106				
95	Bertha E. Stevens	521.63	200.00	200.00
96	Lester H. Stone	1,495.24	1,000.00	1,000.00
97	Moses Stone Company, a corporation	10,578.20	10,000.00	10,000.00
98	Robert S. Strauss and Company, a corporation	3,904.61	500.00	500.00
99	Sucherman Pharmacy, Inc., a corporation	487.69	1,000.00	487.69
100	May Swanson, trading as Dixie Donut Shop	14.88	1,300.00	14.88
101	Terrace Chocolate Shop, a corporation	277.56	200.00	200.00
102	R. R. Thompson, doing business as Louise Style Shop	1,098.62	1,500.00	1,098.62
103	Tilt Top Mfg. Co., a corporation	60.03	13,000.00	60.03
104	Tower Recreation of South Chicago, Inc., a corporation	60.03	500.00	60.03
105	United Department Stores, Inc., a corporation	6,987.79	10,000.00	6,987.79
106	Max N. Vogel	6,826.51	7,000.00	6,826.51
107	Webber and Wells, Inc., a corporation	993.38	5,000.00	993.38
108	Hugo Weiss, doing business as The United States Die Casting Co.	736.07	1,500.00	736.07
109	William H. Weinhoeber	6.67	500.00	6.67
110	Ben Weissman	44.47	1,000.00	44.47
111	Whiteside and Wentworth, Inc., a corporation	7,915.84	10,000.00	7,915.84
112	Samuel H. Wolk, doing business as Wolk's Style Shop	824.03	1,500.00	824.03
113	Midland Products Manufacturing Co., a corporation	836.11	1,000.00	836.11
		$260,953.91		$197,076.31

107 Thereupon the plaintiffs offered in evidence a document, being the form of receiver's bond in bankruptcy, and being a copy of the receiver's bond in bankruptcy case No. 49279, International Golfers, Inc., Bankrupt, which document so offered was received in evidence as PLAINTIFF'S EXHIBIT 3 and is in words and figures as follows, to-wit:

108 PLAINTIFFS' EXHIBIT 3.

The Continental Casualty Company
General Office: Chicago

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In the Matter of International Golfers, Inc., a corporation, Bankrupt.	In Bankruptcy No. 49279.

Know All Men By These Presents, That, Sam Howard of Chicago, Illinois, as Principal, and the Continental Casualty Company, having an office and principal place of business at No. 910 South Michigan Avenue, in the City of Chicago, County of Cook, State of Illinois, as Surety, are held and firmly bound unto the United States of America in the sum of One Thousand ($1,000.00) Dollars, lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made, the said Sam Howard binds himself, his heirs, executors, and administrators and said surety company binds itself, its successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of February, A. D. 1932.

Whereas, by an order made by Hon. John P. Barnes, United States District Judge, dated the 29th day of February, A. D. 1932, the said Sam Howard was appointed, with the usual powers, Receiver of International Golfers, Inc., a corporation, Bankrupt, until the appointment of a Trustee in Bankruptcy herein:

Now, Therefore, the condition of this Obligation is such, That if the said Sam Howard shall faithfully discharge the duties of his trust as such Receiver, and shall well and truly

account for all moneys and property that shall come into his hands, and shall abide by and perform all things which he in said order is instructed to do, or shall hereafter be by the Court commanded to perform, then this obligation shall be void, otherwise to be in full force and effect.

Witness:

SAM HOWARD (L. S.)
CONTINENTAL CASUALTY COMPANY
By JOHN H. R. JAMAR
Attorney-in-fact.

Approved:
JOHN P. BARNES
United States District Judge
29—February—1932.

109 Thereupon it was stipulated and agreed that receiver's bonds in the same form as shown by defendants' Exhibit 3, and containing the same terms and conditions except as to their dates, amounts, designation of estates and dates mentioned and referred to therein, were executed by the defendants, Sam Howard, as principal, and Continental Casualty Company, as surety, in the nine different bankrupt estates involved in case No. 44270.

Thereupon the plaintiffs offered in evidence a document showing the net amount on deposit in the Phillips State Bank and Trust Company on the date of its closing to the credit of Sam Howard as receiver of the respective estates involved in case No. 44270 after taking credit for the dividend paid said estates out of proceeds received from the depository bond of said bank, and showing the respective amounts of receiver's bonds executed in said bankrupt estates involved in said case No. 44270, which document so offered was received in evidence as PLAINTIFF'S EXHIBIT 4 and is in words and figures as follows, to-wit:

110 PLAINTIFFS' EXHIBIT 4.

9/16/35

United States of America, on relation of Chester A. Willoughby, as Receiver in Bankruptcy of Eli Lande and Morris Lande, individually and as copartners, trading as Lande Brothers, et al.,
Plaintiff,
vs.
Sam Howard and Continental Casualty Company, a corporation,
Defendants.
} No. 44270.

Count	Name	Net Amount on Deposit	Bond	Amount Claimed
1	Eli Lande and Morris Lande, individually and as co-partners, doing business as Lande Brothers	$ 8,667.78	$10,000.00	$ 8,667.78
2	Lake County Fuel and Supply Company, a corporation	2,222.88	5,000.00	2,222.88
3	International Golfers, Inc., a corporation	790.99	1,000.00	790.99
4	Progressive Candy Company, a corporation	3,428.23	2,500.00	2,500.00
5	Roy's, Inc., a corporation	9,678.50	2,000.00	2,000.00
6	George F. Bates, doing business as Bates Motor Transport Lines	897.37	5,000.00	897.37
7	Meyer J. Harris	1,139.14	2,500.00	1,139.14
8	The Stanley Knight Co., a corporation	16,030.44	5,000.00	5,000.00
9	Braden's California Products, Inc., a corporation	6.76	2,500.00	6.76
		$ 42,862.09		$ 23,224.92

111 Thereupon it was stipulated and agreed that the defendant, Sam Howard, was appointed trustee in all of the bankruptcy estates involved in cases numbered 43996 and 44241 and that Mr. Chester A. Willoughby was appointed as successor trustee in all of said estates, and that the defendant, Sam Howard, was appointed receiver in all of the bankrupt estates involved in case No. 44270 and that Mr. Chester A. Willoughby has been appointed trustee of said estates succeeding Mr. Howard who was trustee previous to the time Mr. Willoughby succeeded him.

ERNEST W. LUDLOW, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

I am a certified public accountant and have been for thirteen years and practice my profession at 205 West Wacker Drive. In June and July, 1934, I had occasion to make an examination in connection with the books and records of the Phillips State Bank, spending approximately one hundred ten hours on this examination which was made at the bank and also in the office of the receiver of the bank. Said bank is located at Clark and Lunt Streets at about 7000 North Clark Street. I made this examination at the request of Mr. Willoughby who is here in the court room. (Mr. Willoughby was called upon to stand up and was identified by the witness.) I was requested, according to a list submitted to me by Essington & McKibbin, attorneys, to make an examination of 124 depository accounts in the Phillips State Bank under the name of Sam Howard, receiver and trustee, and to also examine Sam Howard's personal and special account found in the depositor's ledger, and his loan account and the account showing his indirect liability as endorser, and I have reported such examinations to Mr. Beebe, attorney for the plaintiff. I also went into the question of the condition of the bank and examined statements thereof for the last day of each month from August 31st, 1930, to June 21st, 1932, and also went into the question of the amount of deposits and the various matters of that character. I made a transcript showing the date of deposits and withdrawals and the balances at the end of each month of the 124 trustee and receiver's accounts and have that transcript with me and it is correct in accordance with the books and records of the bank. Thereupon said document, containing in all, seven schedules was marked plaintiff's Exhibit 5 for identification.

Witness: The first column on schedule 1 of plaintiff's Exhibit 5, for identification, represents the sum of the end of the month balances from August 31st, 1930, to June 21st, 1932, of the 124 accounts of estates transferred to Chester A. Willoughby where Chester A. Willoughby was appointed
112 trustee to succeed Sam Howard. The second column represents the sum of the end of the month balances for the same period of all other Sam Howard, trustee, accounts not included in these 124 cases. The third column represents the sum of the first two columns, being the aggregate

of all of Sam Howard's trustee accounts and the end of the month balances. The fourth column represents the total deposits in the Phillips State Bank at the end of each month noted. The fifth column is the ratio that Sam Howard's deposits bear to the total deposits at the end of each month, being the relationship column 3 bears to column 4. The sixth column represents the individual demand deposits at the end of each month, commercial deposits subject to checking accounts as distinguished from savings accounts; and the books of the bank show that at the time the deposits were made by Sam Howard they were placed in commercial accounts under individual demand deposits. The next column, being number 7, is the percentage of Sam Howard's deposits to the individual demand deposits of the bank. Column 8 represents the amount of government bonds due from banks and cash at the end of each month, cash items readily convertible. Column 9 represents the ratio of the cash items and bonds in column 8 to column 4. The tenth column is the ratio of Sam Howard's deposits to cash and government bonds, that is, the relation of column 3 to column 8. These figures in all these columns are accurate and correct and were taken from the books and records of the Phillips State Bank, except the ratios and percentages, which I figured and are correct.

To all of which testimony the defendants object, except as to column 3 showing deposits by Howard, as not binding on defendants and because no proof that Howard had knowledge thereof, and because that part of testimony relating to transfer of accounts to Chester A. Willoughby and relating to ratio and percentages of certain columns is mere conclusion of witness, and because statements as to general deposits, cash and bonds, etc., singles out but one element of the condition of the bank and does not tend to show its general condition, and because computations by witness are merely an argument to the jury and because otherwise incompetent, irrelevant and immaterial. Objections overruled. Exceptions taken and allowed.

Thereupon plaintiffs offered said columns 1 to 10 inclusive of schedule No. 1 of plaintiff's Exhibit 5, for identification, in evidence, to all of which the defendants objected on the grounds heretofore stated. Objections overruled and exception taken and allowed. Thereupon said columns No. 1 to 10, inclusive, of schedule No. 1 of plaintiff's Exhibit 5 were received in evidence and are in words and figures as shown on plaintiff's Exhibit 5, hereinafter set out in full.

113 Thereupon the defendants objected to reading said exhibits to the jury until the plaintiffs have proven that the defendant Howard had notice of the facts therein shown. Objection overruled, exception taken and allowed.

Thereupon the plaintiffs offered in evidence their EXHIBIT 5, for identification, to which offer the defendants objected on the grounds previously stated as to the columns comprising schedule No. 1, and as to other schedules contained in said Exhibit 5, for identification. They object because incompetent, immaterial and irrelevant and have nothing to do with the issues of this case, particularly the schedule as to Sam Howard's loan account and indirect liability account. Objection overruled, exception taken and allowed. Thereupon plaintiff's Exhibit 5 for identification was received in evidence as PLAINTIFF'S EXHIBIT 5 and is in words and figures as follows, to-wit:

123 Sam Howard Accounts in
Phillip State Bank
Report on Special Investigation
Ernest W. Ludlow
Certified Public Accountants
205 West Wacker Drive
Chicago

122 Ernest W. Ludlow
Certified Public Accountant
205 West Wacker Drive
Chicago

Telephone Central 8674

September Five,
Nineteen Thirty-four.

Mr. C. A. Willoughby, Receiver,
Chicago, Illinois.

Dear Sir:

In compliance with your request, I have examined the records of the deposit and loan accounts of Sam Howard in the Phillip State Bank, and have prepared and submit herewith the following statements:

Statement Showing Monthly Balances and Ratios, August 31, 1930 to June 21, 1932	Schedule #1
List of Deposits in August 1930	Schedule #2

Summary Showing End of Month Balance in Sam Howard Personal and Loan Accounts, August, 1930 to June, 1932	Schedule #3
Summary of Sam Howard Personal Account, August, 1930 to June, 1932	Schedule #4
Summary of Sam Howard Special Account, August, 1930 to June, 1932	Schedule #5
Transcript of Sam Howard Loan Account, August, 1930 to June, 1932	Schedule #6
Transcript of Account Showing Indirect Liability as Endorser of Notes, December, 1930 to June, 1932	Schedule #7

Respectfully submitted,
ERNEST W. LUDLOW,
Certified Public Accountants.

Sam Howard Accounts in Phillip State Bank
Statement Showing Monthly Balances and Ratios
August 31, 1930, to June 21, 1932

1930	124 Accounts Transferred To C. A. Willoughby	Other Sam Howard Trustee Accounts	Total Sam Howard Accounts	Total Deposits The Phillip State Bank	Per cent Sam Howard Deposits of Total	Individual Demand Deposits	Per cent Sam Howard Deposits of Total Individual Demand Deposits	Phillip State Bank Government Bonds, Due from Banks and Cash	Ratio to Total Deposits	Ratio of Sam Howard Deposits to Cash and Govts.
August	$164,499.85	$ 85,033.47	$249,533.32	$3,401,014.29	7.33	$1,784,379.15	13.98	$ 888,392.89	26.12	28.09
September	178,936.25	127,554.91	306,491.16	3,756,421.23	8.16	2,097,893.31	14.61	830,778.63	22.11	36.89
October	178,418.90	169,977.67	348,396.57	3,617,916.18	9.63	2,066,698.12	16.86	885,970.79	24.48	39.32
November	177,480.25	213,452.22	390,932.47	3,451,042.57	11.33	1,962,936.46	19.62	786,612.41	22.79	49.70
December	189,134.25	188,576.16	377,710.41	3,867,030.02	9.77	2,339,214.89	16.15	1,109,028.77	28.68	34.06
1931										
January	203,487.15	182,622.46	386,109.61	3,356,279.90	11.50	1,947,453.23	19.83	733,763.13	21.86	52.62
February	205,710.01	176,439.83	382,149.84	3,502,867.68	10.91	2,089,012.63	18.29	887,625.38	25.34	43.05
March	196,597.57	169,168.00	365,765.57	3,785,553.69	9.66	2,398,108.74	15.25	1,169,365.21	30.89	31.28
April	202,353.07	149,142.67	351,495.74	2,737,414.08	12.84	1,784,109.47	19.70	880,517.08	32.17	39.92
May	239,393.66	137,510.29	376,903.95	2,795,062.24	13.48	1,827,256.52	20.63	804,270.47	29.38	46.86
June	165,203.33	129,760.48	294,963.81	2,288,601.35	12.89	1,486,630.09	19.84	829,413.58	36.24	35.56
July	172,157.08	69,290.18	241,447.26	2,591,894.74	9.32	1,612,120.01	14.97	846,921.58	32.67	28.51
August	197,183.04	58,103.19	250,286.23	2,519,088.12	9.94	1,535,051.34	16.30	796,902.94	31.63	31.41
September	209,153.28	51,369.00	260,522.28	2,338,864.50	11.14	1,565,786.35	16.64	806,546.04	34.48	32.30
October	210,689.16	38,188.71	248,877.87	2,243,758.35	11.09	1,486,834.08	16.74	734,941.94	32.71	33.90
November	220,848.36	33,164.89	254,013.25	2,361,616.27	10.76	1,605,290.66	15.82	757,134.88	32.06	33.55
December	219,383.83	33,077.35	252,461.18	2,707,631.00	9.32	1,822,348.42	13.85	937,022.09	34.61	26.94
1932										
January	235,904.73	30,366.21	266,270.94	2,219,507.76	12.00	1,593,881.43	16.71	789,922.76	35.59	33.71
February	302,527.55	46,278.19	348,805.74	2,360,245.97	14.78	1,738,839.33	20.06	830,126.29	35.17	42.02
March	330,450.95	55,752.72	386,203.67	2,614,712.03	14.77	1,945,994.22	19.84	981,442.07	37.54	39.34
April	354,877.93	44,046.93	398,924.86	2,582,140.57	14.45	1,962,576.50	20.32	851,141.88	32.96	46.87
May	371,036.21	26,652.29	397,688.50	2,599,240.11	15.30	1,974,051.81	20.15	865,981.46	33.31	45.92
June 21	390,328.84	26,505.06	416,833.90	2,101,710.51	19.83	1,625,057.14	25.65	561,721.56	26.73	74.21

120

Schedule #2

Also

PLAINTIFF'S EXHIBIT NO. 6.

Sam Howard Accounts in Phillip State Bank

List of Deposits in August, 1930

Date 1930	Account		Amount
Aug. 25	*National Theatre Corp.		$132,707.00
27	David Kaplan	$ 1,258.39	
	State Auto Parts Corp.	3,619.94	
	Van Buren Optical Co.	400.00	
	Wertheimer Co.	392.88	
	Anderson & Skoog	214.24	
	Apex Stores	398.55	
	Art Calendar and Novelty Co.	3,632.50	
	Beach View Gardens	5,392.34	
	Beachy and Lawler	15,556.80	
	*Edw. G. Becker	306.85	
	Jas. Berdych	2,424.89	
	Phillip Braverman	4,201.86	
	Brook Electric Supply Co.	10,914.50	
	Chicago Manifold Co.	2,218.42	
	*Cook, Thomas & Cash	502.41	
	F. B. George	10,874.19	
	Hyman Gill	2,757.58	
	Herman Lappe	684.30	
	Master Barber Towel Sup. Co.	200.00	
	*North Shore Tile Co.	456.51	
	Fred J. Rehling	771.85	
	*May Sawnson, d.b.a. Dixie Donut Shop	1,343.20	
	W. H. Taylor	18,220.94	87,743.14
28	*Eagle Metal Ware Mfg. Co.	$ 8,122.03	
	*Kolax Co.	5,433.94	
	*National Mechanical Service Corp.	968.10	
	Regal Press	60.66	
	*Bennetts, Inc.	14,160.08	
	Chicago Manifold Co.	545.52	
	*Signe Chouinard	499.73	
	Drexel Cleaners and Dyers	500.00	
	Universal Wireless Corp.	27.95	30,318.01
	Total		$249,968.15

* Included in the 124 accounts transferred to C. A. Willoughby.

119 Schedule #3

Summary Showing End of Month Balances in Sam Howard Personal and Loan Accounts in Phillip State Bank.

August, 1930, to June, 1932

1930	Sam Howard Account	Sam Howard Special Account	Total Accounts	Sam Howard Loan	Sam Howard Indirect Liability as Endorser	Total Direct and Indirect
August		$ 25.28	$ 25.28	$11,000.00		$11,000.00
September	$ 938.08	50.80	988.88	13,500.00		13,500.00
October	731.29	356.55	374.74	13,500.00		13,500.00
November	231.25	824.82	593.57	13,500.00		13,500.00
December	213.91	2,129.53	1,415.62	13,500.00	$1,028.61	14,528.61
1931						
January	1,305.28	2,736.83	1,431.55	13,500.00	1,028.61	14,528.61
February	268.24	2,418.38	2,150.14	15,000.00	1,028.61	16,028.61
March	1,095.77	3,298.86	2,203.09	15,000.00	1,434.44	16,434.44
April	2,196.41	4,209.55	2,013.14	15,000.00	1,333.86	16,333.86
May	928.04	4,569.65	3,641.61	17,500.00	1,219.69	18,719.69
June	997.24	5,747.52	4,750.28	17,500.00	1,117.58	18,617.58
July	2,006.16	5,349.00	7,355.16	18,515.00	1,015.25	19,530.25
August	1,356.44	5,865.55	7,221.99	18,515.00	1,015.25	19,530.25
September	1,744.37	6,441.86	8,186.23	18,515.00	1,015.25	18,530.25
October	1,034.02	6,966.11	8,000.13	17,500.00	1,015.25	18,515.25
November	700.82	7,175.42	7,876.24	17,500.00	1,015.25	18,515.25
December	4,167.27	4,650.37	8,817.64	17,500.00	1,000.00	18,500.00
1932						
January	3,607.19	5,153.19	8,760.38	17,500.00	1,000.00	18,500.00
February	3,380.47	4,310.33	7,690.80	17,500.00	6,075.00	23,575.00
March	4,017.60	4,433.66	8,451.26	17,500.00	6,075.00	23,575.00
April	3,337.78	4,322.53	7,660.31	17,500.00	6,075.00	23,575.00
May	2,438.59	4,284.29	6,722.88	17,500.00	1,000.00	18,500.00
June 21	2,247.43	3,606.20	5,853.63	17,500.00	1,000.00	18,500.00

118

Schedule #4

Also

PLAINTIFF'S EXHIBIT NO. 7.

Summary of Sam Howard Account
in Phillip State Bank
September, 1930, to June, 1932

1930	Checks	Deposits	End of Month Balance
September	$ 561.92	$1,500.00	$ 938.08
October	1,006.36	799.57	731.29
November	1,267.47	304.93	231.65
December	1,212.21	729.55	713.91
1931			
January	1,224.01	632.64	1,305.28
February	1,251.89	2,288.93	268.24
March	1,670.12	842.59	1,095.77
April	1,354.51	253.87	2,196.41
May	1,536.93	2,805.30	928.04
June	1,768.82	1,699.62	997.24
July	580.25	3,583.65	2,006.16
August	1,283.65	633.93	1,356.44
September	618.51	1,006.44	1,744.37
October	1,401.18	690.83	1,034.02
November	942.25	609.05	700.82
December	716.58	4,183.03	4,167.27
1932			
January	935.47	375.39	3,607.19
February	704.27	477.55	3,380.47
March	368.98	1,006.11	4,017.60
April	1,207.09	527.27	3,337.78
May	1,395.24	496.05	2,435.59
June 1, to June 21	191.16		2,247.43

117 Schedule #5

Also

PLAINTIFF'S EXHIBIT NO. 8.

Summary of Sam Howard Special Account
in Phillip State Bank
August 6, 1930, to June 21, 1932

1930	Checks	Deposits	End of Month Balance
August (First Deposit August 5, 1930, $5,000.00)	$10,974.72	$11,000.00	$ 25.28
September	974.48	1,000.00	50.80
October	407.35		356.55
November	147.50	1,328.87	824.82
December	1,674.24	2,978.95	2,129.53
1931			
January	539.09	1,146.39	2,736.83
February	1,007.43	688.98	2,418.38
March	312.68	1,193.16	3,298.86
April	787.88	1,698.57	4,209.55
May	1,038.01	1,398.11	4,569.65
June	1,090.03	2,267.90	5,747.52
July	2,049.79	1,651.27	5,349.00
August	759.65	1,276.20	5,865.55
September	727.82	1,304.13	6,441.86
October	778.34	1,302.59	6,966.11
November	901.78	1,111.09	7,175.42
December	4,246.81	1,721.76	4,650.37
1932			
January	3,071.19	3,574.01	5,153.19
February	1,068.51	225.65	4,310.33
March	601.70	725.03	4,433.66
April	850.37	739.24	4,322.52
May	736.80	698.56	4,284.29
June 1, to June 21	748.09	70.00	3,606.20

116 Schedule #6 Page 1

Also

Page 1 of PLAINTIFF'S EXHIBIT NO. 9

Transcript of Sam Howard Loan Account
with Phillip State Bank
August 6, 1930 to June 21, 1932

1930		Interest Rate	Due Date	Debits	Credits	Balance
Aug.	6			$5,000.00		
	19	5	10/17/30	6,000.00		$11,000.00
Sep.	10	4½	12/ 9/30	2,500.00		13,500.00
Nov.	7				$5,000.00	
	7	5	2/ 1/31	5,000.00		
	26				6,000.00	
	26	4½	2/15/31	6,000.00		13,500.00
Dec.	12				2,500.00	
	12	4½	3/ 9/31	2,500.00		13,500.00
1931						
Feb.	4				5,000.00	
	4	5	5/ 3/31	5,000.00		
	5	5	3/ 5/31	1,500.00		
	17				6,000.00	
	17	4½	5/16/31	6,000.00		15,000.00
Mar.	11				2,500.00	
	11				1,500.00	
	11	5	6/ 7/31	2,500.00		
	11	5	6/ 3/31	1,500.00		15,000.00
May	5				5,000.00	
	5	5	8/ 2/31	5,000.00		
	6	4½	7/ 5/31	2,500.00		
	19				6,000.00	
	19	4½	8/14/31	6,000.00		17,500.00
June	2				1,500.00	
	2	5	8/ 1/31	1,500.00		
	19				2,500.00	
	19	5	9/ 5/31	2,500.00		17,500.00
July	6	6	10/ 1/31	1,015.00		
	11				2,500.00	
	11	4½	9/ 7/31	2,500.00		18,515.00
Aug.	10				5,000.00	
	10				1,500.00	
	10	5	10/29/31	1,500.00		
	10	5	10/31/31	5,000.00		
	18				6,000.00	
	18	4½	11/12/31	6,000.00		18,515.00
Sep.	9				2,500.00	
	9				2,500.00	
	9		12/ 6/31	2,500.00		
	9		12/ 4/31	2,500.00		18,515.00
Oct.	1				1,015.00	17,500.00
	31				5,000.00	
	31				1,500.00	
	31	5 Renewal	1/29/32	5,000.00		
	31	5 "	1/27/32	1,500.00		17,500.00

115 Schedule #6 Page 2

Also

Page 2 of PLAINTIFF'S EXHIBIT NO. 9

Transcript of Sam Howard Loan Account
with Phillip State Bank
August 6, 1930 to June 21, 1932

1931		Interest Rate	Due Date	Debits	Credits	Balance
Nov.	18				$6,000.00	
	18	5 Renewal		$6,000.00		$17,500.00
Dec.	9				2,500.00	
	9				2,500.00	
	9	5 Renewal	3/ 4/32	2,500.00		
	9	5 "	3/ 6/32	2,500.00		17,500.00
1932						
Feb.	2				5,000.00	
	2				1,500.00	
	2	5	4/26/32	1,500.00		
	2	5	4/28/32	5,000.00		17,500.00
	16				6,000.00	
	16	5	5/10/32	6,000.00		
Mar.	8				2,500.00	
	8				2,500.00	
	8	5 Renewal	6/ 2/32	2,500.00		
	8	5 "	6/ 4/32	2,500.00		17,500.00
Apr.	29				1,500.00	
	29	5 "	7/25/32	1,500.00		17,500.00
May	4				5,000.00	
	4	5	8/ 1/32	5,000.00		
	16				6,000.00	
	16		8/ 8/32	6,000.00		17,500.00
June	6				2,500.00	
	6	5	9/ 2/32	2,500.00		
	7				2,500.00	
	7	5	9/ 2/32	2,500.00		17,500.00

114 Schedule #7

Also

PLAINTIFF'S EXHIBIT NO. 10

Transcript of Account Showing Sam Howard's Indirect Liability as Endorser of Notes at Phillip State Bank December, 1930, to June, 1932

Date 1930		Due Date	Debits	Credits	Balance
Dec. 5	Wm. R. Strook	5/ 3/31	$ 513.00		
5	" " "	6/ 3/31	515.61		$1,028.61
1931					
Mar. 9	Froehling & Heffe	4/ 3/31	100.58		
9	" "	5/ 3/31	101.17		
9	" "	6/ 2/31	101.75		
9	" "	7/ 2/31	102.35		1,434.44
Apr. 7				$ 100.58	1,333.86
May 5				513.00	
5	Wm. B. Strook	8/ 2/31	500.00		
3				101.17	1,219.69
June 4				515.61	
4	Mr. Strook	12/ 3/31	515.25		
11				101.75	1,117.58
Jul. 20				102.33	1,015.25
Aug. 10				500.00	
10		10/30/31	500.00		1,015.25
Nov. 4				500.00	
4		1/28/31	500.00		1,015.25
Dec. 9				515.25	
9	Roy Strook	6/ 1/32	500.00		1,000.00
1932					
Feb. 2				500.00	
2	Roy Strook	4/27/32	500.00		
8	Art. Lamp Mfg. Co.	5/ 5/32	5,075.00		6,075.00
Apr. 29				500.00	
29	Roy Strook	7/26/32	500.00		6,075.00
May 5				5,075.00	
June 7				500.00	
7	Roy Strook	8/30/32	500.00		1,000.00

124 Witness: I have separated from the deposits made in the bank by Sam Howard in the 124 accounts above referred to, deposits made during the last three days of the life of the bank and they are as follows: On June 20th, 1932, there was deposited to the credit of Sam Howard, as trustee of Wladyslaw Lewandowski, also known as Walter Lewandowski, $338.50; as trustee of the Stanley Knight Company, a corporation, $959.27; as trustee of Harry Graff, Inc., $100.00; as trustee of the United Air Cleaners, $401.93. Between August, 1930, and June 21st, 1932, I found particular periods of time when the deposits, or rather the withdrawals, were greater than any other period of time. I determined this from the withdrawal slips or records of withdrawals during those times.

Witness: I find there were three periods where the withdrawals from the bank were greater in amount and number than in other periods. I made no figures during these periods to show what occurred, no complete figures, I did not attempt to arrive at the totals, I made some examination but did not arrive at the totals. The periods I found that this condition prevailed were April 15th to April 18th, 1931, June 8th to June 15th, 1931, June 18th until the bank closed on June 21st, 1932. I also found such a period from September 21st to 24th, 1931, so there were really four such periods.

Objections by the defendants, because incompetent, irrelevant and immaterial and Howard had no notice thereof and because conclusion of witness and because it appears from the testimony of the witness that he had no figures on which to base his conclusions of fact.

The Court: I understand he testified, first as to three periods and then he said he found a period in September that had no figures.

Mr. Beebe: Have you any figures on all of them?

A. No, sir. No summary or complete figures but I have some figures. I also have some figures which indicate particular borrowing times.

Mr. Beebe: I am just offering these, as a basis, on dates, and later I expect to bring in definite evidence on these particular dates. That was all I am offering at this time, to try to get these dates.

Objections renewed, overruled and exceptions taken and allowed.

Witness: The first deposit I found in the bank to the credit of Sam Howard as trustee or receiver in bankruptcy was in

August, 1930. Schedule 2 of Plaintiff's Exhibit 5 is a list of deposits in August, 1930, and they are true and correct as shown by the books and records of the bank. Schedule 4 of Plaintiff's Exhibit 5 is a summary of the account in the individual depositor's ledger designated as the Sam Howard
125 Account, from September, 1930, to June, 1932, showing first the amount of checks that were taken out, and second, the amount of deposits, and finally the amount that Sam Howard had on credit in his account at the end of the month and showing that he had $2,247.43 on deposit in the bank at the end of the period of time. Schedule 5 of Plaintiff's Exhibit 5 is my schedule 5, being a summary of an acount in the individual depositor's ledger, designated as the Sam Howard Special Account from August, 1930, to June, 1932. It does not show why it is a special account as distingushed from Schedule 4. In the second column is the amount of the deposits, in the first column the amount of checks, and in the last column the balance at the end of the month which show that Sam Howard had $3,606.20 to his balance at the time the bank closed. Schedule 6 of Plaintiff's Exhibit 5 is a transcript of the account designated on the books of the bank as the Sam Howard Loan Account. It does not show whether or not any collateral was put up in connection therewith. When I say debit that represents loans or money advanced to Sam Howard on this loan account. Thus, on August 6th it indicates a loan to Sam Howard of $5,000.00, and on August 19th a loan of $6,000.00, or a total at the end of August of $11,000.00. The first column represents the dates that the loans were made, the second column the interest rate, the next column the due date, the fourth column the amounts loaned, the fifth column the amounts repaid and the last column the end of the month balances. The description that I have made with reference to these columns carries through both pages. Schedule 7 of Plaintiff's Exhibit 5 is a transcript of the account designated as the Sam Howard Indirect Liability as Endorser and so kept on the books of the bank as reflected by this Schedule and showing a $1,000.00 balance which existed at the time the bank closed.

Thereupon said schedules Nos. 2, 4, 5, 6 and 7 of Plaintiff's Exhibit 5 were offered in evidence, to which offers severally the defendants objected as being incompetent, irrelevant and immaterial and not bearing on the issues in this case or binding on the defendants. Objections overruled, exceptions taken and allowed, Thereupon said schedules Nos.

2, 4, 5, 6 and 7, respectively, of Plaintiff's Exhibit 5, were received in evidence as PLAINTIFF'S EXHIBITS Nos. 6, 7, 8, 9 and 10 respectively, and are in words and figures as set out in Plaintiff's Exhibit 5.

126 Witness: I did not find any other Sam Howard accounts in the bank other than those we have talked about here and to the best of my knowledge I have put in evidence here the story of the Sam Howard accounts in so far as I have been examined thereon. The paper you have just handed me represents a transcript of the accounts of the Sam Howard estates, as shown by the individual depositor's ledger in the bank. On the general records of the bank loans were designated as secured or unsecured and with respect to Plaintiff's Exhibit 9, being my schedule No. 6, they show these as unsecured.

The documents handed the witness were marked PLAINTIFF'S EXHIBITS 11 to 18, inclusive, for identification, and the witness was withdrawn to make an examination of certain documents.

Plaintiff submitted that Section 7 of Chapter 16a of the Illinois Revised Statute has reference to publication of notice of the condition of a bank which must be made once in every three months, and presented photostatic copies of the publisher's certificate showing quarterly statements of the Phillips State Bank and Trust Company published in accordance with this law and they were offered in evidence as PLAINTIFF'S EXHIBITS 11 to 18, inclusive, and it was agreed that were filed with the Auditor of Public Accounts in the State of Illinois and were published in accordance with Section 7, Chapter 16a of the Illinois Statutes in the Chicago Evening Post on the dates set forth therein. Defendants objected, however, to their introduction in evidence because they are incompetent, irrelevant and immaterial, do not prove any of the issues in the case and there is no proof that the information contained was ever brought to the attention of the defendant, Sam Howard, and they do not purport to show anything about the condition of the Phillips State Bank. Objection overruled and exception taken and allowed. Thereupon said documents were received in evidence and were marked PLAINTIFF'S EXHIBITS 11 to 18, inclusive, and are in words and figures as follows, to-wit:

127 PLAINTIFF'S EXHIBIT 11.

Publisher's Certificate.

Forward Certificate as soon as possible to Auditor of Public Accounts, Springfield, Illinos.

Read Carefully.

The instructions on this form are all legal requirements and must be carried out completely.

All incomplete or incorrect forms will be returned for correction.

I. Each Bank report must be published in some newspaper published in the city or town where such bank is located; or if no newspaper is published in such town, then in the nearest newspaper to such town.

II. It must be publshed in the same form, and the same order of items as given on the reverse side of this sheet, including the full title and location of bank, the affidavit of president or cashier and the notary's certificate.

III. Items which remain blank in the orignal may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

State of Illinois, } ss.
County of Cook. }

I, Carroll Shaffer publisher of The Chicago Evening Post a newspaper published at Chicago, County of Cook and State of Illinois, do solemnly swear that the report of Phillip State Bank and Trust Company located at Chicago, Illinois, a true copy of which is hereto annexed, was published in said newspaper in its issue of the 16th day of July, 1930.

CARROLL SHAFFER,
Publisher.

This certificate should be sworn to by the Publisher before an officer authorized to administer oaths.

Subscribed and sworn to before me this 16th day of July, 1930.

JOHN E. HOGAN,
Notary Public.

(Seal)

Cut the printed report from the newspaper and attach below. Paste securely.

(Official Publication)

Report of the Condition of
Phillip State Bank & Trust Company

Located at 7001 North Clark street, Chicago, State of Illinois, at the close of business on the 30th day of June, 1930, as made to the Auditor of Public Accounts of the State of Illinois, pursuant to law.

Resources.

1.	Cash, other cash resources and due from banks (1, 2, 3)	$ 538,251.84
2.	U. S. Government investments (4)	11,900.00
3.	Other bonds and securities (5)	1,286,149.40
4.	Loans on collateral security (6a)	1,010,338.22
5.	Other loans (6b)	400,934.06
6.	Loans on real estate (6c)	835,450.00
7.	Overdrafts (7)	160.51
8.	Other real estate (8)	2,797.25
9.	Banking house furniture and fixtures (9)	101,750.57
12.	Other resources (12)	180,166.08
	Total resources	$4,367,897.93

Liabilities.

1.	Capital stock (1)	$ 500,000.00
2.	Surplus (2)	200,000.00
3.	Undivided profits (net) (3)	44,439.10
4.	Reserve accounts (4)	58,972.00
5.	Demand deposits (5a)	1,610,294.96
6.	Time deposits (5b)	1,858.076.90
10.	Dividends unpaid (7)	10,190.50
13.	Other liabilities (10)	85,924.41
	Total Liabilities	$4,367,897.93

I, Michael J. Long, Cashier of the Phillip State Bank & Trust Company, do solemnly swear that the above statement is true to the best of my knowledge and belief, and that the items and amounts shown above correspond with the items

and amounts shown in the report made to the Auditor of Public Accounts, State of Illinois, pursuant to law.

MICHAEL J. LONG,
Cashier.

State of Illinois, } ss.
County of Cook. }

Subscribed and sworn to before me this 7th day of July, 1930.

GEORGE A. MOORE,
(Seal) *Notary Public.*

Cut the printed report from the newspaper and attach above. Paste securely.

128 PLAINTIFF'S EXHIBIT 12.

Publisher's Certificate.

Forward Certificate as soon as possible to Auditor of Public Accounts, Springfield, Illinois.

Read Carefully.

The instructions on this form are all legal requirements and must be carried out completely.

All incomplete or incorrect forms will be returned for correction.

I. Each Bank report must be published in some newspaper published in the city or town where such bank is located; or if no newspaper is published in such town, then in the nearest newspaper to such town.

II. It must be published in the same form, and the same order of items as given on the reverse side of this sheet, including the full title and location of bank, the affidavit of president or cashier and the notary's certificate.

III. Items which remain blank in the orignal may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

State of Illinois, } ss.
County of Cook. }

I, H. M. Van Dusen Secretary of The Chicago Evening Post a newspaper published at Chicago, County of Cook and State of Illinois, do solemnly swear that the report of Phillip State

Bank and Trust Company located at Chicago, Illinois, a true copy of which is hereto annexed, was published in said newspaper in its issue of the 11th day of October, 1930.

H. M. VAN DUSEN,
Secretary.

This certificate should be sworn to by the Publisher before an officer authorized to administer oaths.

Subscribed and sworn to before me this 11th day of October, 1930.

JOHN E. HOGAN,
(Seal) *Notary Public.*

Cut the printed report from the newspaper and attach below. Paste securely.

(Official Publication)

Report of the Condition of
Phillip State Bank & Trust Company

Located at 7001 North Clark street, Chicago, State of Illinois, at the close of business on the 24th day of September, 1930, as made to the Auditor of Public Accounts of the State of Illinois, pursuant to law.

Resources.

1.	Cash, other cash resources and due from banks (1, 2, 3)	$ 551,369.46
2.	U. S. governments (4)	1,900.00
3.	Other bonds and securities (5)	1,272,658.50
4.	Loans on collateral security (6a)	1,069,459.27
5.	Other loans (6b)	519,429.53
6.	Loans on real estate (6a)	824,924.28
7.	Overdrafts (7)	97.60
8.	Other real estate (8)	2,797.25
9.	Banking house, furniture and fixtures (9)	101,647.12
10.	Customers' liability under letters of credit (10)	900.00
12.	Resources (12)	189,194.87
	Total Resources	$4,534,377.88

Liabilities.

1.	Capital stock (1)	$ 500,000.00
2.	Surplus (2)	200,000.00
3.	Undivided profits (net) (3)	52,717.83
4.	Reserve accounts (4)	71,117.93
5.	Demand deposits (5a)	2,039,795.36
6.	Time Deposits (5b)	1,550,660.32
7.	Due to banks (5c)	25,223.55
10.	Dividends unpaid (7)	474.50
11.	Letters of credit (8)	900.00
13.	Other liabilities (10)	93,488.39
	Total Liabilities	$4,534,377.88

I, Michael J. Long, Cashier of the Phillip State Bank & Trust Company, do solemnly swear that the above statement is true to the best of my knowledge and belief, and that the items and amounts shown above correspond with the items and amounts shown in the report made to the Auditor of Public Accounts, State of Illinois, pursuant to law.

MICHAEL J. LONG,
Cashier.

State of Illinois, }
County of Cook. } ss.

Subscribed and sworn to before me this 4th day of October, 1930.

ROBERT D. COLEMAN,
(Seal) *Notary Public.*

My commission expires April 8, 1933.

Cut the printed report from the newspaper and attach above. Paste securely.

129 PLAINTIFF'S EXHIBIT 13.

Publisher's Certificate.

Forward Certificate as soon as possible to Auditor of Public Accounts, Springfield, Illinos.
Read Carefully.

The instructions on this form are all legal requirements and must be carried out completely.

All incomplete or incorrect forms will be returned for correction.

I. Each Bank report must be published in some newspaper published in the city or town where such bank is located; or if no newspaper is published in such town, then in the nearest newspaper to such town.

II. It must be published in the same form, and the same order of items as given on the reverse side of this sheet, including the full title and location of bank, the affidavit of president or cashier and the notary's certificate.

III. Items which remain blank in the orignal may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

State of Illinois, } ss.
County of Cook. }

I, H. M. Van Dusen Secretary of The Chicago Evening Post a newspaper published at Chicago, County of Cook and State of Illinois, do solemnly swear that the report of Phillip State Bank and Trust Company located at Chicago, Illinois, a true copy of which is hereto annexed, was published in said newspaper in its issue of the 14 day of January, 1931.

H. M. Van Dusen,
Secretary.

This certificate should be sworn to by the Publisher before an officer authorized to administer oaths.

Subscribed and sworn to before me this 14th day of January, 1931.

John E. Hogan,
Notary Public.

(Seal)

Cut the printed report from the newspaper and attach below. Paste securely.

(Official Publication)

Report of the Condition of
Phillip State Bank & Trust Company

Located at 7001 North Clark street, Chicago, State of Illinois, at the close of business on the 31st day of December, 1930, as made to the Auditor of Public Accounts of the State of Illinois, pursuant to law.

Resources.

1.	Cash, other cash resources and due from banks (1, 2, 3)	$ 720,539.91
2.	U. S. government investments (4)	61,400.00
3.	Other bonds and securities (5)	1,279,092.25
4.	Loans on collateral securities (6a)	1,040,997.24
5.	Other loans (6b)	375,664.88
6.	Loans on real estate (6c)	857,474.28
7.	Overdrafts (7)	1,245.61
8.	Other real estate (8)	94,870.29
9.	Banking-house furniture and fixtures (9)	101,647.12
12.	Other resources (12)	143,585.87
	Total Resources	$4,676,517.45

Liabilities.

1.	Capital stock (1)	$ 500,000.00
2.	Surplus (2)	200,000.00
3.	Undivided profits (net) (3)	35,857.22
4.	Reserve accounts (4)	67,590.52
5.	Demand deposits (5a)	2,282,692.09
6.	Time deposits (5b)	1,431,533.36
7.	Due to banks (5c)	26,849.11
10.	Dividends unpaid (7)	201.50
13.	Other liabilities (10)	131,793.65
	Total Liabilities	$4,676,517.45

I, Michael J. Long, Cashier of the Phillip State Bank & Trust Company, do solemnly swear that the above statement is true to the best of my knowledge and belief, and that the

items and amounts shown above correspond with the items and amounts shown in the report made to the Auditor of Public Accounts, State of Illinois, pursuant to law.

MICHAEL J. LONG,
Cashier.

State of Illinois, } ss.
County of Cook. }

Subscribed and sworn to before me this 7th day of January, 1931.

ROBERT D. COLEMAN,
Notary Public.

(Seal)

Cut the printed report from the newspaper and attach above. Paste securely.

130 PLAINTIFF'S EXHIBIT 14.

Publisher's Certificate.

Forward Certificate as soon as possible to Auditor of Public Accounts, Springfield, Illinois.

Read Carefully.

The instructions on this form are all legal requirements and must be carried out completely.

All incomplete or incorrect forms will be returned for correction.

I. Each Bank report must be published in some newspaper published in the city or town where such bank is located; or if no newspaper is published in such town, then in the nearest newspaper to such town.

II. It must be published in the same form, and the same order of items as given on the reverse side of this sheet, including the full title and location of bank, the affidavit of president or cashier and the notary's certificate.

III. Items which remain blank in the original may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

State of Illinois, } ss.
County of Cook. }

I, O. G. Osburn, Assistant Secretary of Chicago Post Publishing Corporation, Publisher of The Chicago Evening Post a newspaper published at Chicago, County of Cook and State of Illinois, do solemnly swear that the report of Phillip State Bank and Trust Company located at Chicago, Illinois, a true copy of which is hereto annexed, was published in its issue of the 8 day of April, 1931.

O. G. OSBURN,
Assistant Secretary.

This certificate should be sworn to by the Publisher before an officer authorized to administer oaths.

Subscribed and sworn to before me this 7 day of April, 1931.

JOSEPH E. KIELY,
(Seal) *Notary Public.*

Cut the printed report from the newspaper and attach below. Paste securely.

(Official Publication)

Report of the Condition of

Phillip State Bank & Trust Company

Located at 7001 North Clark street, Chicago, State of Illinois, at the close of business on the 25th day of March, 1931, as made to the Auditor of Public Accounts of the State of Illinois, pursuant to law.

Resources.

1.	Cash, other cash resources and due from banks (1, 2, 3)	$ 645,443.31
2.	U. S. government investments (4)	253,353.13
3.	Other bonds and securities (5)	1,251,099.21
4.	Loans on collateral security (6a)	999,902.24
5.	Other loans (6b)	387,911.63
6.	Loans on real estate (6c)	780,224.28
7.	Overdrafts (7)	2,584.37
8.	Other real estate (8)	95,233.30
9.	Banking-house furniture and fixtures (9)	102,276.12
12.	Other resources (12)	143,220.65
	Total Resources	$4,661,248.33

Liabilities.

1.	Capital stock (1)	$ 500,000.00
2.	Surplus (2)	200,000.00
3.	Undivided profits (net) (3)	34,137.41
4.	Reserve accounts (4)	58,430.07
5.	Demand deposits (5a)	2,481,918.79
6.	Time deposits (5b)	1,329,720.39
7.	Due to banks (5c)	25,330.32
10.	Dividends unpaid (7)	188.50
13.	Other liabilities (10)	31,513.94
	Total Liabilities	$4,661,248.33

I, Michael J. Long, Cashier of the Phillip State Bank & Trust Company, do solemnly swear that the above statement is true to the best of my knowledge and belief, and that the items and amounts shown above correspond with the items and amounts shown in the report made to the Auditor of Public Accounts, State of Illinois, pursuant to law.

MICHAEL J. LONG,
Cashier.

State of Illinois, } ss.
County of Cook. }

Subscribed and sworn to before me this 31st day of March, 1931.

ROBERT D. COLEMAN,
Notary Public.

(Seal)

Cut the printed report from the newspaper and attach above. Paste securely.

131 PLAINTIFF'S EXHIBIT 15.

Publisher's Certificate.

Forward Certificate as soon as possible to Auditor of Public Accounts, Springfield, Illinois.

Read Carefully.

The instructions on this form are all legal requirements and must be carried out completely.

All incomplete or incorrect forms will be returned for correction.

I. Each Bank report must be published in some newspaper published in the city or town where such bank is located; or if no newspaper is published in such town, then in the nearest newspaper to such town.

II. It must be published in the same form, and the same order of items as given on the reverse side of this sheet, including the full title and location of bank, the affidavit of president or cashier and the notary's certificate.

III. Items which remain blank in the orignal may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

State of Illinois, } ss.
County of Cook. }

I, O. G. Osburn, Assistant Secretary of the Chicago Post Publishing Corporation and publisher of The Chicago Evening Post, a newspaper published at Chicago, County of Cook and State of Illinois, do solemnly swear that the report of Phillip State Bank & Trust located at Chicago, Illinois, a true copy of which is hereto annexed, was published in said newspaper in its issue of the 18 day of July, 1931.

O. G. Osburn,
Assistant Secretary.

This certificate should be sworn to by the Publisher before an officer authorized to administer oaths.

Subscribed and sworn to before me this 18 day of July, 1931.

Joseph E. Kiely,
(Seal) *Notary Public.*

Cut the printed report from the newspaper and attach below. Paste securely.

(Official Publication)

Report of the Condition of
Phillip State Bank & Trust Company

Located at Chicago, State of Illinois at the close of business on the 30th day of June, 1931, as made to the Auditor of Public Accounts of the State of Illinois, pursuant to law.

Resources.

1.	Cash, other cash resources and due from banks (1, 2, 3)	$ 394,522.00
2.	U. S. government investments (4)	51,400.00
3.	Other bonds and securities (5)	1,218,732.47
4.	Loans on collateral security (6a)	737,586.40
5.	Other loans (6b)	314,625.69
6.	Loans on real estate (6c)	635,774.28
7.	Overdrafts (7)	2,251.66
8.	Other real estate (8)	93,470.66
9.	Banking-house, furniture and fixtures (9)	103,744.12
12.	Other resources (12)	108,853.24
	Total Resources	$3,660,960.61

Liabilities.

1.	Capital stock (1)	$ 500,000.00
2.	Surplus (2)	200,000.00
3.	Undivided profits (net) (3)	25,164.53
4.	Reserve accounts (4)	52,080.21
5.	Demand deposits (5a)	1,627,267.20
6.	Time deposits (5b)	836,871.58
7.	Due to banks (5c)	83,614.07
8.	Bills payable (6a)	300,000.00
10.	Dividends unpaid (7)	215.25
13.	Other liabilities (10)	36,737.78
	Total Liabilities	$3,660,960.61

I, Michael J. Long, Cashier of the Phillip State Bank & Trust Company, do solemnly swear that the above statement is true to the best of my knowledge and belief, and that the items and amounts shown above correspond with the items and amounts shown in the report made to the Auditor of Public Accounts, State of Illinois, pursuant to law.

MICHAEL J. LONG,
Cashier.

State of Illinois, } ss.
County of Cook. }

Subscribed and sworn to before me this 10th day of July, 1931.

ROBERT D. COLEMAN,
(Seal) *Notary Public.*

Cut the printed report from the newspaper and attach above. Paste securely.

132 PLAINTIFF'S EXHIBIT 16.

Publisher's Certificate.

Forward Certificate as soon as possible to Auditor of Public Accounts, Springfield, Illinois.

Read Carefully.

The instructions on this form are all legal requirements and must be carried out completely.

All incomplete or incorrect forms will be returned for correction.

I. Each Bank report must be published in some newspaper published in the city or town where such bank is located; or if no newspaper is published in such town, then in the nearest newspaper to such town.

II. It must be published in the same form, and the same order of items as given on the reverse side of this sheet, including the full title and location of bank, the affidavit of president or cashier and the notary's certificate.

III. Items which remain blank in the original may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

State of Illinois, } ss.
County of Cook. }

I, O. G. Osburn, Assistant Secretary of the Chicago Post Publishing Corporation, publisher of Chicago Evening Post, a newspaper published at Chicago, County of Cook and State of Illinois, do solemnly swear that the report of Phillip State Bank & Trust Company located at Chicago, Illinois, a true copy of which is hereto annexed, was published in said newspaper in its issue of the 17th day of Oct., 1931.

O. G. OSBURN,
Assistant Secretary.

This certificate should be sworn to by the Publisher before an officer authorized to administer oaths.

Subscribed and sworn to before me this 17th day of Oct. 1931.

JOSEPH E. KIELY,
Notary Public.

(Seal)

Cut the printed report from the newspaper and attach below. Paste securely.

(Official Publication)

Report of the Condition of
Phillip State Bank & Trust Company

Located at Chicago, State of Illinois, at the close of business on the 29th day of September, 1931, as made to the Auditor of Public Accounts of the State of Illinois, pursuant to law.

Resources.

1.	Cash, other cash resources and due from banks (1, 2, 3)	$ 518,244.70
2.	U. S. government investments (4)	131,400.00
3.	Other bonds and securities (5)	1,200,477.80
4.	Loans on collateral securities (6a)	655,066.56
5.	Other loans (6b)	216,269.15
6.	Loans on real estate (6c)	579,174.28
7.	Overdrafts (7)	1,168.11
8.	Other real estate (8)	93,501.97
9.	Banking-house, furniture and fixtures (9)	101,191.12
12.	Other resources (12)	120,744.23
	Total Resources	$3,464,837.81

Liabilities.

1.	Capital stock (1)	$ 500,000.00
2.	Surplus (2)	200,000.00
3.	Undivided profits (net) (3)	40,003.04
4.	Reserve accounts (4)	55,852.66
5.	Demand deposits (5a)	1,544,851.33
6.	Time deposits (5b)	780,678.39
7.	Due to banks (5c)	60,432.15
8.	Bills payable (6a)	271,000.00
10.	Dividends unpaid (7)	189.75
13.	Other liabilities (10)	11,829.88
	Total Liabilities	$3,464,837.81

I, Michael J. Long, Cashier of the Phillip State Bank & Trust Company, do solemnly swear that the above statement is true to the best of my knowledge and belief, and that the items and amounts shown above correspond with the items and amounts shown in the report made to the Auditor of Public Accounts, State of Illinois, pursuant to law.

MICHAEL J. LONG,
Cashier.

State of Illinois, } ss.
County of Cook. }

Subscribed and sworn to before me this 9th day of October, 1931.

FRANKLIN GROSSER,
(Seal) *Notary Public.* —

Cut the printed report from the newspaper and attach above. Paste securely.

133 PLAINTIFF'S EXHIBIT 17.

Publisher's Certificate.

Forward Certificate as soon as possible to Auditor of Public Accounts, Springfield, Illinois.

Read Carefully.

The instructions on this form are all legal requirements and must be carried out completely.

All incomplete or incorrect forms will be returned for correction.

I. Each Bank report must be published in some newspaper published in the city or town where such bank is located; or if no newspaper is published in such town, then in the nearest newspaper to such town.

II. It must be published in the same form, and the same order of items as given on the reverse side of this sheet, including the full title and location of bank, the affidavit of president or cashier and the notary's certificate.

III. Items which remain blank in the original may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

State of Illinois, }
County of Cook. } ss.

I, O. G. Osburn, Assistant Secretary of the Chicago Post Publishing Corporation, publisher of Chicago Evening Post, a newspaper published at Chicago, County of Cook and State of Illinois, do solemnly swear that the report of Phillip State Bank & Trust Company located at Chicago, Illinois, a true copy of which is hereto annexed, was published in said newspaper in its issue of the 16th day of Jan. 1932.

O. G. Osburn,
Assistant Secretary.

This certificate should be sworn to by the Publisher before an officer authorized to administer oaths.

Subscribed and sworn to before me this 16th day of Jan. 1932.

Joseph E. Kiely,
(Seal) *Notary Public.*

Cut the printed report from the newspaper and attach below. Paste securely.

(Official Publication)

Report of the Condition of
Phillip State Bank & Trust Company

Located at 7001 North Clark street Chicago, State of Illinois, at the close of business on the 31st day of December, 1931, as made to the Auditor of Public Accounts of the State of Illinois, pursuant to law.

Resources.

1.	Cash, other cash resources and due from banks (1, 2, 3)	$ 514,358.71
2.	U. S. government investments (4)	131,400.00
3.	Other bonds and securities (5)	1,169,630.01
4.	Loans on collateral security (6a)	567,087.60
5.	Other loans (6b)	172,522.34
6.	Loans on real estate (6c)	583,599.28
7.	Overdrafts (7)	618.16
8.	Other real estate (8)	93,936.97
9.	Banking-house, furniture and fixtures (9)	104,679.62
12.	Other resources (12)	156,708.61
	Total Resources	$3,494,550.30

Liabilities.

1.	Capital stock (1)	$ 500,000.00
2.	Surplus (2)	200,000.00
3.	Undivided profits (net) (3)	38,390.35
4.	Reserve accounts (4)	46,396.50
5.	Demand deposits (5a)	1,938,427.13
6.	Time deposits (5b)	655,357.11
7.	Due to banks (5c)	79,278.01
10.	Dividends unpaid (7)	109.75
13.	Other liabilities (10)	36,591.45
	Total Liabilities	$3,404,550.30

I, Michael J. Long, Cashier of the Phillip State Bank & Trust Company, do solemnly swear that the above statement is true to the best of my knowledge and belief, and that the items and amounts shown above correspond with the items and amounts shown in the report made to the Auditor of Public Accounts, State of Illinois, pursuant to law.

MICHAEL J. LONG,
Cashier.

State of Illinois, } ss.
County of Cook. }

Subscribed and sworn to before me this 9th day of January, 1932.

FRANKLIN CROSSER,
(Seal) *Notary Public.*

Cut the printed report from the newspaper and attach above. Paste securely.

134 PLAINTIFF'S EXHIBIT 18.

Publisher's Certificate.

Forward Certificate as soon as possible to Auditor of Public Accounts, Springfield, Illinois.

Read Carefully.

The instructions on this form are all legal requirements and must be carried out completely.

All incomplete or incorrect forms will be returned for correction.

I. Each Bank report must be published in some newspaper published in the city or town where such bank is located; or if no newspaper is published in such town, then in the nearest newspaper to such town.

II. It must be published in the same form, and the same order of items as given on the reverse side of this sheet, including the full title and location of bank, the affidavit of president or cashier and the notary's certificate.

III. Items which remain blank in the original may be omitted from the printed report, but the publication must never be condensed by combining two or more items into one.

State of Illinois, }
County of Cook. } ss.

I, O. G. Osburn, Assistant Secretary of the Chicago Post Publishing Corporation, publisher of Chicago Evening Post, a newspaper published at Chicago, County of Cook and State of Illinois, do solemnly swear that the report of Phillip State Bank & Trust Company located at Chicago, Illinois, a true copy of which is hereto annexed, was published in said newspaper in its issue of the 16 day of April, 1932.

O. G. OSBURN,
Assistant Secretary.

This certificate should be sworn to by the Publisher before an officer authorized to administer oaths.

Subscribed and sworn to before me this 16 day of April, 1932.

JOSEPH E. KIELY,
Notary Public.

(Seal)

Cut the printed report from the newspaper and attach below. Paste securely.

(Official Publication)

Report of the Condition of
Phillip State Bank & Trust Company

Located at Chicago, State of Illinois, at the close of business on the 30th day of March, 1932, as made to the Auditor of Public Accounts of the State of Illinois, pursuant to law.

Resources.

1.	Cash, other cash resources and due from banks (1, 2, 3)	$ 542,036.46
2.	U. S. government investments (4)	160,204.69
3.	Other bonds and securities (5)	1,213,176.51
4.	Loans on collateral security (6a)	539,320.79
5.	Other loans (6b)	162,040.28
6.	Loans on real estate (6c)	593,424.28
7.	Overdrafts (7)	922.22
8.	Other real estate (8)	87,693.47
9.	Banking-house, furniture and fixtures (9)	105,307.62
12.	Other resources (12)	171,034.68
	Total Resources	$3,575,161.00

Liabilities.

1.	Capital stock (1)	$ 500,000.00
2.	Surplus (2)	200,000.00
3.	Undivided profits (net) (3)	17,122.29
4.	Reserve accounts (4)	46,818.17
5.	Demand deposits (5a)	1,975,735.09
6.	Time deposits (5b)	385,647.13
7.	Due to banks (5c)	23,875.53
8.	Bills payable (6a)	185,478.98
10.	Dividends unpaid (10)	97.75
13.	Other liabilities (10)	40,386.06
	Total Liabilities	$3,575,461.00

I, Michael J. Long, Cashier of the Phillip State Bank & Trust Company, do solemnly swear that the above statement is true to the best of my knowledge and belief, and that the items and amounts shown above correspond with the items and amounts shown in the report made to the Auditor of Public Accounts, State of Illinois, pursuant to law.

MICHAEL J. LONG,
Cashier.

State of Illinois, } ss.
County of Cook. }

Subscribed and sworn to before me this 9th day of April, 1932.

FRANKLIN CROSSER,
(Seal) *Notary Public.*

Cut the printed report from the newspaper and attach above. Paste securely.

135 Plaintiff presented a book entitled "Statement Showing Resources and Liabilities, Illinois State Banks at the Close of Business, June 30, 1934", compiled by Edward J. Barrett, Auditor, printed by authority of the State of Illinois; on page 30 of which is a heading, "In Receivership," at pages 30 and 31, and offered therefrom in evidence, a list of banks that closed in Cook County between August 1st, 1930, and June 21st, 1932, where receivers were appointed during that period, and stated that plaintiff expected to subsequently show those closed before June 21st where the receiver was appointed afterwards. Defendants objected thereto and to the admission in evidence of the fact that any bank closed in Cook County, other than the Phillips State Bank and Trust Company, on the ground that it is irrelevant, immaterial and incompetent and does not tend to prove any issues in this case. Objection overruled, exception taken and allowed.

Thereupon said statement showing banks closed and in receivership in Cook County was received in evidence as PLAINTIFF'S EXHIBIT 19, to which defendants objected, which objection was overruled and exception taken and allowed; said document being in words and figures as follows, to-wit:

136 PLAINTIFF'S EXHIBIT 19.

"In Receivership

Date	Name of Bank.	Town or City.
Aug. 4, 1930	Central Oak Park State Bank, Wm. L. O'Connell, Receiver.	Oak Park,
Aug. 16, 1930	Citizens Trust and Savings Bank, Wm. L. O'Connell, Receiver.	Chicago,
Aug. 16, 1930	Roosevelt-Bankers State Bank, Wm. L. O'Connell, Receiver.	Chicago,
Sept. 22, 1930	Millard State Bank, Chicago, Wm. L. O'Connell, Receiver.	
Oct. 14, 1930	Laramie State Bank of Chicago, Wm. L. O'Connell, Receiver.	Chicago,
Oct. 15, 1930	Lake View State Bank, Chicago, Wm. L. O'Connell, Receiver.	
Nov. 25, 1930	Citizens State Bank of Melrose Park, Wm. L. O'Connell, Receiver.	Melrose Park,
Nov. 26, 1930	Binga State Bank, Chicago, Wm. L. O'Connell, Receiver.	

Feb. 3, 1931 Crawford State Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

Mar. 18, 1931 Novak & Steiskal State Bank, Chicago, Wm. L. O'Connell, Receiver.

Apr. 8, 1931 Lansing State Bank, Lansing, Wm. L. O'Connell, Receiver.

Apr. 18, 1931 Columbus State Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

Apr. 21, 1931 Ridgeway State Bank of Chicago, Chicago, Wm. L. O'Connell, Receiver.

Apr. 27, 1931 Cicero Trust and Savings Bank, Cicero, Wm. L. O'Connell, Receiver.

May 1, 1931 Builders and Merchants Bank and Trust Co., Chicago, W. H. Wade, Receiver.

May 12, 1931 North Town State Bank, Chicago, Wm. L. O'Connell, Receiver.

May 22, 1931 Lincoln Trust and Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

May 26, 1931 Boulevard State Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

June 8, 1931 Montrose Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

June 10, 1931 Humboldt State Bank, Chicago, Wm. L. O'Connell, Receiver.

June 10, 1931 Second Humboldt State Bank, Chicago, Wm. L. O'Connell, Receiver.

June 18, 1931 Commerce Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

June 23, 1931 Cheltenham Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

June 26, 1931 Industrial State Bank of Chicago, Chicago, Wm. L. O'Connell, Receiver.

July 9, 1931 Fullerton State Bank, Chicago, Wm. L. O'Connell, Receiver.

July 10, 1931 Bryn Mawr State Bank, Chicago, Wm. L. O'Connell, Receiver.

July 10, 1931 West Englewood Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

July 10, 1931 Stony Island State Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

137 July 10, 1931 West Lawn Trust and Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

July 10, 1931 Armitage State Bank, Chicago, Wm. L. O'Connell, Receiver.

July 10, 1931 Auburn Park Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.
July 10, 1931 Brainerd State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 10, 1931 Chatham State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 10, 1931 Chicago Lawn State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 10, 1931 Elston State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 10, 1931 Ridge State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 10, 1931 West Highland State Bank, Wm. L. O'Connell, Receiver.
July 16, 1931 Sheridan Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.
July 17, 1931 Elmwood Park State Bank, Elmwood Park, Wm. L. O'Connell, Receiver.
July 20, 1931 Lincoln State Bank of Chicago, Chicago, Wm. L. O'Connell, Receiver.
July 21, 1931 West Town State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 21, 1931 Immel State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 22, 1931 Diversey Trust and Savings Bank, Chicago, Wm. L. O'Connell, Receiver.
July 22, 1931 Second North-Western State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 22, 1931 Mid-West State Bank, Cicero, Wm. L. O'Connell, Receiver.
July 22, 1931 Twelfth Street State Bank, Berwyn, Wm. L. O'Connell, Receiver.
July 24, 1931 South Side Savings Bank & Trust Co., Chicago, J. A. Carroll, Receiver.
July 24, 1931 Glencoe State Bank, Glencoe, Chicago Title & Trust Co., Receiver.
July 27, 1931 Noel State Bank, Chicago, Wm. L. O'Connell, Receiver.
July 28, 1931 Lyons State Bank, Lyons, Wm. L. O'Connell, Receiver.
July 28, 1931 Italian Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.
July 28, 1931 Berwyn State Bank, Berwyn, Wm. L. O'Connell, Receiver.

July 30, 1931 Cragin State Bank, Chicago, L. L. Mullins, Receiver.

July 31, 1931 Roseland State Savings Bank (The, Chicago, Wm. L. O'Connell, Receiver.

Aug. 3, 1931 Des Plaines State Bank, DesPlaines, Wm. L. O'Connell, Receiver.

Aug. 12, 1931 Garfield State Bank, Chicago, J. E. Sullivan, Receiver.

Aug. 12, 1931 North-Western Trust and Savings Bank, Chicago, D. E. Shanahan, Receiver.

Aug. 18, 1931 State Bank of Beverly Hills, Chicago, Wm. L. O'Connell, Receiver.

138 Sept. 22, 1931 Arlington Heights State Bank, Arlington Heights, Wm. L. O'Connell, Receiver.

Sept. 23, 1931 Marquette Park State Bank, Chicago, Wm. L. O'Connell, Receiver.

Sept. 25, 1931 First Italian State Bank, Chicago, Wm. L. O'Connell, Receiver.

Sept. 28, 1931 Mount Greenwood Trust and Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

Oct. 5, 1931 Morton Grove Trust and Savings Bank, Morton Grove, Wm. L. O'Connell, Receiver.

Oct. 20, 1931 Brighton Park State Bank of Chicago, Wm. L. O'Connell, Receiver.

Oct. 20, 1931 Marshall Square State Bank, Chicago, Wm. L. O'Connell, Receiver.

Oct. 21, 1931 Union State Bank of South Chicago, Chicago, Wm. L. O'Connell, Receiver.

Oct. 28, 1931 Hegewisch State Bank, Chicago, Wm. L. O'Connell, Receiver.

Oct. 29, 1931 Madison and Kedzie State Bank, Chicago, W. H. Wade, Receiver.

Nov. 3, 1931 South West Trust and Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

Nov. 10, 1931 Brookfield State Bank, Brookfield, Wm. L. O'Connell, Receiver.

Nov. 18, 1931 Congress Park State Bank, Brookfield, Wm. L. O'Connell, Receiver.

Nov. 21, 1931 Calumet City State Bank, Calumet City, Wm. L. O'Connell, Receiver.

Dec. 7, 1931 Equitable Trust Company of Chicago, Chicago, Wm. L. O'Connell, Receiver.

Jan. 4, 1932 Forest Park Trust & Savings Bank, Forest Park, Wm. L. O'Connell, Receiver.

Jan. 7, 1932 Ashland State Bank, Chicago, Wm. L. O'Connell, Receiver.

Jan. 7, 1932 Proviso State Bank, Maywood, Wm. L. O'Connell, Receiver.

Jan. 9, 1932 Park Ridge State Bank, Park Ridge, Wm. L. O'Connell, Receiver.

Jan. 9, 1932 Melrose Park State Bank, Melrose Park, Wm. L. O'Connell, Receiver.

Jan. 11, 1932 Immigrant State Bank, Chicago, Wm. L. O'Connell, Receiver.

Jan. 12, 1932 Maywood State Bank, Maywood, Wm. L. O'Connell, Receiver.

Feb. 1, 1932 Westwood State Bank, Elmwood Park, Wm. L. O'Connell, Receiver.

Feb. 2, 1932 First State Bank of Steger, Steger, Wm. L. O'Connell, Receiver.

Feb. 2, 1932 Commercial Bank of Chicago Heights, Chicago Heights, Wm. L. O'Connell, Receiver.

Feb. 2, 1932 Service State Bank, Chicago, Wm. L. O'Connell, Receiver.

Feb. 3, 1932 First State Bank of Chicago Heights, Chicago Heights, Wm. L. O'Connell, Receiver.

Feb. 9, 1932 Depositors State Bank, Chicago, Wm. L. O'Connell, Receiver.

Feb. 9, 1932 West-City Trust and Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

Feb. 9, 1932 Kimbell Trust and Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

Feb. 11, 1932 Stockmens Trust and Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

Feb. 25, 1932 Morgan Park Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

Feb. 25, 1932 Wiersema State Bank (The), Chicago, Wm. L. O'Connell, Receiver.

Feb. 25, 1932 First State Bank of Barrington, Barrington, Wm. L. O'Connell, Receiver.

139 Feb. 26, 1932 Baker State Bank, Cicero, Wm. L. O'Connell, Receiver.

Mar. 1, 1932 Bank of Harvey, Harvey, Wm. L. O'Connell, Receiver.

Mar. 8, 1932 Kaufman State Bank of Chicago, Chicago, Wm. L. O'Connell, Receiver.

May 17, 1932 Sherman State Bank, Chicago, Wm. L. O'Connell, Receiver.

June 6, 1932 Citizens State Bank of Chicago, Chicago, Wm. L. O'Connell, Receiver.

June 17, 1932 United American Trust & Savings Bank, Chicago, Wm. L. O'Connell, Receiver.

June 20, 1932 Citizens State Bank of Glencoe, Wm. L. O'Connell, Receiver.

June 20, 1932 Home Bank and Trust Company, Chicago, C. E. Midowicz, Receiver."

MARGUERITE GILMOUR, a witness called on behalf of the plaintiff, being first duly sworn, on direct examination by Mr. Beebe, testified as follows:

I am a deputy clerk in the United States Clerk's Office and keep the records of the banks which have given depository bonds and the amount of such bonds.

Q. Take the period between August 1st, 1930, and June 21st, 1932. Will you state from your record the banks which had depository bonds, the amounts of the depository bonds in each, and any changes which occurred during that period of time?

Mr. Heth: Now, your Honor, I think probably there will be quite a bit of argument on that question because it involves practically the whole issue in this law suit.

The Court: What?

Mr. Heth: I think it involves a tremendous issue in this law suit, and I say we will probably have quite an argument on that question. I do not know whether you want to exclude the jury at this time.

The Court: No.

Mr. Heth: When the motion was made before your Honor to strike this complaint, one of the grounds that was urged quite extensively before you was that the complaint did not state a cause of action, in that it did not allege that there was any other depository in Cook County in which Howard might have deposited his funds, that the complaint alleged only one depository, the existence of one depository, and the complaint set up the elements upon which they hoped to predicate a judgment in this case. In other words, the elements of the lack of due care or negligence on the part of Howard. It was confined to the fact that he deposited money in this bank in excess
140 of the depository bond, and that he failed to report to the court the condition of the bank and as to the amount that he had on deposit.

I remember arguing quite at length on that question, that it would be necessary for Mr. Beebe in his complaint to allege that there were other depositories in which Howard might have deposited his money, and that those depositories had a larger depository bond or were safer because, under the law, the trustee is compelled to deposit his money in a designated depository, and unless that appeared there was no alternative whatever that Howard had except to deposit his money in one designated bank.

The Court overruled that objection that I made, on that point that I raised in that motion.

Now, we are confronted with the introduction of evidence on the very point that I urged at that time, that should have been alleged in his complaint; in other words, he is attempting to prove that the facts which I alleged, or the point that I made at that time, was that the complaint should have alleged it.

Now, there is no allegation in the complaint that there were any other depositories; and I submit that under the state of the pleadings, under no condition is that evidence admissible to show facts tending to show carelessness or lack of due care of Howard which is not alleged in the complaint.

I submit that under no theory of pleading is this evidence admissible.

It is a surprise of the most flagrant type to prove that there were other depositories when there is nothing of that kind alleged in the complaint.

Mr. Moses: May I say this: Even if the allegation were made in the complaint that there were other depositories, that allegation alone would not be sufficient, because it would have to be followed by allegations that the other depositories were receiver depositories, and that would have to be followed by proof of the condition of the other Banks and a comparison would have to be made between the condition of the other depositories, and that the amount of the depository bonds, with the depository in this case, Phillips State Bank and Trust Company, and its bonds.

141 So merely making the allegation that there are other depositories would not aid anything in permitting a result to be accomplished against Howard.

In addition to the charge that other depositories designated by this Court as proper depositories for the funds of this Estate, were better than the Phillips State Bank and Trust Company, and safer than the Phillips State Bank and Trust

Company, and that I suppose would be followed by proof as to each one of the depositories, the financial condition of those banks during this whole period of time in question between July 1st, 1931, and June 1st, 1932.

As this record stands there is only one depository mentioned. You have a situation that requires the funds to be deposited in that stated depository. It seems to me that in the absence of any allegation, not merely that there were other depositories, but in the absence of any allegation that the other depositories were better fit to hold the funds this evidence ought not to be admitted.

Mr. Heth: May I raise one more point, your Honor? The specific objection that I make is that Mr. Beebe has alleged in his complaint certain things alleged to constitute lack of due care and diligence on the part of Howard, and I submit that he is limited to those things. He specifies the things that Howard failed to do, and predicates his cause of action upon the failure to do those things, which he should have done, and doing things which he should not have done.

Now, he is bringing in evidence of the things that are not alleged in the complaint, and I submit that that is foreign to this proceeding.

Mr. Beebe: I have not the slightest expectation of going into the strength or the financial ability of the various other banks in Chicago, nor did I let these gentlemen lead me into a trap in my pleading by stating that there were other banks sounder and better equipped than the one in question, but I am claiming that by depositing with the Phillip State Bank not only the first deposit but every dollar that was left in there above the $50,000.00 was an act of negligence on Howard's part.

Now, I may offer anything that shows that he did not safely carry out his duties as Trustee and Receiver.

142 Now, if at a particular time there were other depositories it does not become incumbent upon us to go into the relative strength of those depositories, or the number of persons that deposited in those other depositories, but the very fact that there are other depositories must be known to Mr. Howard, because the District Court is a Court of record, and these are public orders in the District Court, and this is a public record, and therefore in showing whether Mr. Howard was negligent in depositing in the Phillips State Bank I can bring in the mere fact that there were other depositories other than this one, and I did not have to allege it.

Mr. Heth: In answer to that I submit that it is a fundamental rule of pleading that when you allege that a person did a certain thing which constitutes negligence and rest your case upon that, that you cannot prove something else.

Now, Mr. Beebe in his complaint in this case, has alleged that Mr. Howard did not safely and truly account for all moneys and issues, and did not safely perform his duties as Trustee in Bankruptcy, and then he specifies in that he didn't do certain things, in that he didn't report to the Court in writing the value of the assets, and the amount of money on hand belonging thereto, including the amount of the initial deposit as Trustee of said estate, to the credit of the Trustee or Receiver, or Receiver in Bankruptcy, and did not report the condition of Phillips State Bank and Trust Company as to the amount of its total deposits.

(Counsel reads at length from the complaint).

Those are the allegations that he made in his complaint in this case.

Now, he is trying to prove that Howard failed to do something else than is alleged in the complaint. I don't know just what his argument is as to whether Howard must take notice of the fact that there were other depositories, I don't quite get the argument.

Mr. Moses: That has nothing to do with it.

Mr. Heth: That has nothing to do with the pleadings in this case.

If a person alleged that another person is negligent in that they exceed the speed limit, and alleges nothing else in the declaration, he is limited to showing the fact that they exceeded the speed limit, and that is what Mr. Beebe has done in all these cases.

143 Now, he is attempting to prove something else that is entirely taking the defendant by surprise. I do not know what he is talking about when he speaks of the trap that we laid for him. We certainly didn't lay any trap for him. We didn't bring the law suit.

Whether he was trying to lay a trap for us I don't know.

Mr. Beebe: I didn't mean a trap in any reprehensible sense.

Mr. Heth: He did not make those allegations so that those issues might be met, to show that he was not negligent in putting the money into this depository.

Now, that was all argued out, because I anticipated that

thing, and argued that that should have been alleged in the complaint, but it was not. Now, he is trying—

Mr. Moses: May I amplify that argument a little bit? Let us assume the evidence as offered. Let us assume that it appears there were other depositories; let us assume that the depository bond in the one instance is $60,000.00, and in another instance $100,000.00, in another instance $80,000.00, and let us assume that you are examining the amount of depository bonds with the Trustees in bankruptcy, and find that these other banks had millions of dollars on deposit, some as high as $500,000.00, and some as high as over a million dollars on deposit.

Mr. Beebe: That is your assumption.

Mr. Moses: It is an assumption for the purpose of illustrating the argument.

If you are to permit evidence as to the other depositories that were selected by this Court in making its designation, that allegation alone could not support any recovery in this case, without proving the condition of the other banks; it would be necessary to prove the amount of the moneys in these other banks subject to check by Trustees and Receivers in Bankruptcy, with a comparison of the amount of the depository bonds in this and the other banks as required by this Court, and the amount of depository bonds in this bank as required this court, and now I submit that upon a declaration that charges only one depository, especially in the light of the argument that was made to your Honor that there ought
144 to be additional allegations if it was intended to offer proof on the subject, and counsel ought not to be permitted now to introduce proof of other depositories, because he opens up other issues in this case that have not been heralded by anything in this case.

Mr. Beebe: Now, your Honor—

The Court: Just a moment. I assume that a person who is appointed to act as trustee, and who acts as trustee may have a discretion with respect to the selection of the depository.

Mr. Moses: Is that something that requires a statement from me, or is that a statement simply made by your Honor—

The Court: Oh, I will put it in the form of a question.

Mr. Moses: I will say then if I may answer that, that the very purpose of the statute is to make it unnecessary for a trustee to exercise any discretion on the subject; that is the very purpose of the designation of the depositorys, the very

reason why the court may in some instances require a $30,000.00 bond and in other instances a $100,000.00 bond, and the court informs himself as to the strength of that bank.

The Court: Supposing the court here had designated 10 banks, is the particular trustee who is appointed in any bankruptcy matter vested with any discretion to make a selection between banks?

Mr. Moses: I think he may make it, yes, among the ten banks; but he isn't required to exercise judgment as to which he may select.

The Court: There is some point in this offer.

Mr. Beebe: This is the point of my offer; I am not going into the question of the solvency of the bank, or anything else of that kind, but the theory of the offer—

Objection of the defendants overruled and the defendants excepted to the ruling of the court, which exceptions were allowed.

Mr. Heth: It is understood that our objection on behalf of both defendants goes to all this line of testimony and is overruled.

The Court: Yes. Exceptions by the defendants taken and allowed.

Witness: The banks in Cook County for the period between August 1, 1930 and June 21, 1932, according to the records in my hands, which had depository bonds, the amounts of such bonds of each and the changes which occured with respect thereto are as follows: The Central Trust Co. of Illinois
145 filed their bond December 17th, 1923, for $50,000.00; on June 9th, 1931, an additional bond for $200,000.00 for the Central Trust Company was filed; Chicago Bank of Commerce of Chicago filed a bond on May 7th, 1930, for $50,000.00; Chicago Trust Company of Chicago filed a bond April 5th, 1923, for $50,000.00, and that Bank later merged with the National Bank of the Republic, and the Continental Illinois Bank and Trust Company filed a bond on July 25th, 1929, for $50,000.00, and on July 18th, 1932, that bond was cancelled and a bond of $250,000.00 was filed. The Cosmopolitan State Bank filed a bond on July 10th, 1925, for $100,000.00. The Edgewater Trust & Savings Bank of Chicago filed a bond on March 6th, 1930, for $50,000.00, and on April 18th, 1931, a bond for $20,000.00 was cancelled. The First National Bank of Chicago filed a bond on November 9th, 1898, for $50,000.00, and on July 12th, 1931, an additional bond of $200,000.00. The Harris Trust & Savings Bank filed a bond on June 24th, 1931, for

$50,000.00 and on June 24th, 1932, filed an additional bond of $100,000.00. The Jackson Park National Bank filed a bond on April 15th, 1924, for $50,000.00. The National Bank of the Republic filed a bond on January 11th, 1924, for $50,000.00. Later it consolidated with the Central Trust and the bond was increased to $250,000.00 on June 24th, 1931. The Northern Trust Company filed a bond on November 4th, 1932, for $250,000.00. (The Northern Trust Company filed a bond for $50,000.00 on November 11th, 1898 for $50,000.00 which was later cancelled and the $250,000.00 bond substituted.) The Oak Park Trust & Savings Bank of Oak Park, Illinois, filed a bond for $50,000.00 on May 26th, 1932. The Peoples Trust & Savings Bank filed a bond April 11th, 1928, for $50,000.00. The Phillip State Bank & Trust Company of Chicago filed a bond for $50,000.00 on August 20th, 1930. The State Bank of Chicago, filed bond for $50,000.00 on January 16th, 1924, and later it merged with the Foreman National Bank. Straus National Bank & Trust Company of Chicago filed a bond July 3rd, 1930, for $50,000.00. The South Side Trust & Savings Bank of Chicago filed a bond January 25th, 1929, for $50,000.00 and that was cancelled February 20th, 1931, and the South Side Savings Bank & Trust Company filed a bond on January 14th, 1931, for $50,000.00. The Transportation Bank of Chicago filed a bond January 15th, 1930, for $50,000.00. The Union Bank of Chicago filed bond January 24th, 1930, for $5,000.00 and that was cancelled on January 30th, 1932. The Union Trust Company filed a bond December 19th, 1923, for $50,000.00, and it merged with the First National Bank. The Washington Park National Bank of Chicago
146 filed a bond May 28th, 1931, for $50,000.00. The Woodlawn Trust & Savings Bank of Chicago filed a bond April 9th, 1923, for $50,000.00. Harris Trust & Savings Bank filed two bonds on June 26th, 1931, for $50,000.00 each and then on June 24th, 1932, they filed for $100,000.00 and cancelled the other two bonds.

Plaintiff's witness, ERNEST W. LUDLOW, recalled for further direct examination by Mr. Beebe, testified as follows:

I have gone through the records as to deposits made by Sam Howard as trustee and receiver during the particular periods mentioned in my previous testimony and they are as follows: April 16th, 1931, Advertising Display Company, $502.50, April 15th, 1931, Bennett's, Inc., $86.49, Froemling &

Hepp, $308.60, W. H. Rogers, $13.28; April 15th, 1931, Bennett's, Inc., $364.07; June 10th, 1931, Resnikoff & Alberts, $16.00; June 12th, 1931, Resnikoff & Alberts, $25.60; September 23rd, 1931, Janows & Kramer Company, $197.70, Max M. Vogel, $70.00; September 22nd, 1931, Max M. Vogel, $65.00. That is all for April, June and September and only includes any deposit in these 124 accounts. As to any others he may have deposited I am unable to say.

The sheet I hold in my hand is a tabulation of the statement of condition of the Phillips State Bank on the last day of each month from August, 1930, to June 21st, 1932, and was drawn from the daily statement of conditions made up by the bank which was handed to me from the records of the Phillips State Bank at the bank and which I found in the vaults of the bank. There was such a statement for each month during the period referred to and I have truly and correctly copied that statement from the sheet now in front of me. The first time I examined this was last Saturday. On one side it says "resources" and on the other, "liabilities". The resources come first and the liabilities are directly below that.

147 *Cross-Examination of Plaintiff's Witness, Ernest W. Ludlow, by Mr. Heth.*

Referring to Schedule 4 of plaintiff's Exhibit 5, being also plaintiff's Exhibit 7, and being a summary of Sam Howard's Account in the Phillips State Bank from September, 1930 to June, 1932, the summary shows that at the time the bank closed Sam Howard had on deposit in this account $2,247.33, that being the amount that the bank owed Mr. Howard on this account at the time it closed, and this account is distinguished from another account that Sam Howard had in said bank designated as a special account, being plaintiff's Exhibit 8.

I can determine from Sam Howard's loan account how much he borrowed from the bank during the month of August, 1930, and the amount is $11,000.00. Referring back to Schedule 5, being plaintiff's Exhibit 8, it shows that he made deposits in his special account of this amount of money on the same date that the money was borrowed, presumably, therefore, the money borrowed was deposited in the special account. Schedule 5 shows that from time to time Howard made deposits in his special account and drew checks upon it. As distinguished from renewals, Schedule 6 shows the following specific loans: August 6th, 1930, $5,000.00; August 19th, 1930, $6,000.00;

September 10th, 1930, $2,500.00; February 5th, 1931, $1,500.00; May 6th, 1931, $2,500.00; July 6th, 1931, $1,015.00. These appear to have been all that were made. The $1,015.00 loan was paid on October 1st, 1931.

Deducting the total amount of money that the bank owed Sam Howard at the time it closed, from the total amount that Howard owed the bank at the time it closed, leaves a balance of $11,646.37 that Howard owed the bank at the time it closed. As to the periods during April, June and September, 1931, and the early part of 1932, that I testified about Howard making certain deposits, I have not checked to see whether or not he made any withdrawals during that period.

I made another examination of the items set forth in Schedule 7 with reference to Sam Howard's indirect liability to the bank to determine the status of those specific items and do not know whether the notes outlined therein are notes that he received in payment of account, whether it was accommodation endorsement or what it was. I did not examine the notes.
148 I just took this from the ledger account.

Referring to Schedule 7 of Exhibit 10 with reference to notes endorsed by Howard, the information I got on these notes was from the ledger sheets that were handed to me by Mr. Morris who was there in the bank at that time in some executive capacity working for the receiver of the bank, and my recollection is that the sheet he handed me did not have any other information about these notes except what I have copied down and I don't recall any notation that the notes were receiver's notes or notes that had been received by Howard in his capacity as receiver, and I did not make any examination as to that. I just took my schedule from the sheet that Mr. Morris handed to me. I did not, as a certified public accountant, satisfy myself as to whether these were in fact indirect liabilities of Howard or not as I did not consider that was within the scope of my investigation.

Redirect Examination of Plaintiff's Witness, Ernest W. Ludlow, by Mr. Beebe.

I do not know whether the Morris referred to in my cross-examination was Emerson J. Morris, formerly auditor of this bank.

Thereupon plaintiff called the defendant, Sam Howard, to testify as for cross-examination under Section 60 of the Illinois Practice Act.

Thereupon the defendants objected, which objection the court sustained.

Thereupon said defendant was called by plaintiff to testify as a witness on behalf of the plaintiff and said defendant, after being duly sworn, testified on direct examination by Mr. Beebe, as follows:

I live at 6241 Winthrop Avenue, Chicago, and am one of the defendants in this case. Of the $11,000.00 that was deposited in the Phillips State Bank on August 6th, 1919, $9,500.00 of this amount, as I remember, was used in paying a loan to another bank.

Cross-Examination of Plaintiff's Witness, Sam Howard, by Mr. Moses.

$7,000.00 of the $9,500.00 testified to on direct examination was paid to the Foreman Trust & Savings Bank and $2,500.00 of said amount to the Central Trust Company of Illinois.

Q. At the time that you were depositing the money in
149 the Foreman Trust & Savings Bank, were the funds that you were depositing in that bank funds of receivership and trusteeship estates?

Mr. Beebe: I object to that as immaterial.

A. Yes, sir.

Mr. Beebe: I just asked one question of the witness.

Mr. Moses: I know you did. May I show your Honor the relevancy of this testimony, because it will be developed in connection with this subject matter generally—

The Court: The question is whether it is cross-examination. Mr. Beebe didn't ask anything except was any of the money used to pay other banks and he said yes. You ask him for the name of the bank or banks. It may be objectionable but I thought he opened the door for you to ask him that.

Mr. Beebe: I think that is as far as it went, and I didn't open the door for his case.

Mr. Moses: The inference is left that it was a personal loan by Mr. Howard for personal purposes.

Thereupon the court adjourned until 9:30 A. M., September 17th, 1935.

The case came on for further hearing on this the 17th day of September, 1935, when the court met pursuant to adjournment, and the following proceedings were had, to-wit:

The same appearances as before.

VINCENT A. GREEN, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified on direct examination by Mr. Beebe, as follows:

I am an optometrist with my place of business at 7027 North Clark Street, about 100 feet from the Phillips State Bank and Trust Company. I moved to this location from across the street and have been at both locations in all for the past 17 years, being located on the first floor during that period of time. I was familiar with the conditions that obtained during the years 1930, 1931 and 1932 in the vicinity of the Phillips State Bank. I was a depositor of that bank. I recall several bank failures on the North side during the year 1931. I recall the Builders & Merchants Bank & Trust Company that was a consolidation of the Capital State and Builders & Merchants State Bank down on Clark Street.

Thereupon it was admitted that this witness would testify as to the closing dates of the banks on the list heretofore offered in evidence by the plaintiff, subject to the defendants' objection to the competency and relevancy of such testimony.

Witness: I recall the Northtown State Bank but I do not recall the Lincoln Trust & Savings Bank or the Boulevard
150 State Savings Bank. At the time the Builders and Northtown State Banks closed there were small runs on the Phillips State Bank. This was about the first bank that closed.

Objection by the defendants as merely a conclusion of the witness.

The Court: He can tell what he saw.

Witness: I recall the time the Sheridan Trust closed and when the First National took over the Foreman Bank. I do not recall whether anything happened at the Phillips State Bank at the time the Sheridan Trust closed and I did not see anything at the Phillips State Bank during the year 1931 that particularly attracted my attention. Yes in 1931 I saw a lot of people there at the Phillips State Bank. I do not know how many times, maybe five or six. I would just see people drawing money out of the bank, I cannot say the number. I just saw them taking their money out just the same as any other bank at that time of the year. The corridors of the bank were filled. It was a large bank and could hold a lot of people and was pretty well filled a couple of times and the street outside was pretty well filled. On the day the Rogers

Park National Bank closed there was quite a big run. It closed about three or four o'clock in the afternoon and we had a meeting at the theatre that night. Well, I guess Mr. Sussman, manager, owner of the theatre had the meeting.

Objection by defendants as to what depositors of Rogers Park Bank did at meeting as not being material, objection overruled, exception taken and allowed.

Witness: Yes, Mr. Beutel, President of the Phillips State Bank was present and I was there. Yes, there was a conversation about the Phillips State Bank at that meeting.

Objection, overruled, exception taken and allowed.

Witness: I do not recall whether there were any handbills put out in the neighborhood in connection with the Phillips State Bank at that time at that meeting. The theatre was pretty well filled, jammed. A speech was made by Mr. Beutel. I cannot recall that the condition of the Phillips State Bank was mentioned in his speech or any other speech. I do not know whether there were any rumors in the neighborhood with reference to the solvency of the Phillips State Bank. A lot of people came in my store and talked about it as often as a couple of times a day.

Defendants move to strike all testimony of this witness because incompetent, irrelevant and immaterial and having no bearing on the controversy. Motion overruled, exception taken and allowed.

No cross-examination.

151 MICHAEL J. LONG, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified on direct examination by Mr. Beebe:

My business is that of a realtor. I have been in the real estate business since June, 1932, and prior to that time I was a banker, my last association being with the Phillips State Bank and Trust Company since September 29th. Prior to that time I was assistant to the officers of the Central Trust Company. I was vice-president and cashier of the Phillips State Bank & Trust Company, cashier until January, 1931, and vice-president after that and, as such, actively associated with the affairs of the bank. As cashier I had general operations of the bank. On June 21st, 1932, the Phillips State Bank and Trust Company closed its doors and there was a run on the bank prior to its closing that started Saturday afternoon, the second business day prior to its closing. The

run was apparently precipitated by the closing of the Devon Trust & Savings Bank which closed on the same day that the run started. I recall a bank on the North side known as the Builders & Merchants Bank and Trust Company that was a consolidation of certain other banks, being the Builders and Merchants State Bank and the Capital State Bank. Assuming that that bank closed on April 11th, 1931, I recall the Northtown State Bank at the corner of Western and Devon. Assuming that that bank closed on April 13th, 1931, I recall the Lincoln Trust and Savings Bank at Irving Park Boulevard and Lincoln Avenue. Assuming that that bank closed on April 15th, I recall the Boulevard State Bank. There was a disturbance at the Phillips State Bank and Trust Company after the closing of the Builders & Merchants and the Northtown State Banks, but that did not have so much effect. The disturbance was the withdrawal of certain sums of money by depositors. There was a slight run after the closing of these two banks. I do not recall when the Fullerton State Bank or the Sheridan Trust & Savings Bank closed. I recall the transaction of the consolidation of the First National and Foreman National, but not of the Elston State Bank and the Diversey, and I do not know whether the Sheridan Trust had any relationship to this consolidation or not.

About that time there was another run at the Phillips State Bank. It was heavier than the prior run but not a very heavy run as we term bank runs. I do not recall how much
152 money was taken out of the bank on these two runs or that an amount in excess of $1,400,000.00 was taken out. At the time of the closing of the Rogers Park National Bank we had a formidable run on the bank. There was a meeting in the Adelphia Theatre on Clark Street after that run at which Mr. Beutel made an address, I was present. The theatre was filled to capacity. At the September run at one time or another the bank was filled, but not continually. The run continued about a day and a half. There were possibly 200 people in the lobby at any one time during the first run. I do not recall any runs before that.

There were three runs in 1931. In 1932 there was a run in June, two days prior to the closing of the bank, and that is the only actual run that I recall in that year. I would not say that there were any other times of several withdrawals during that year other than these. A daily statement of the condition of the bank was made up and used by the officers in connection with the business and looked on as an official rec-

ord of the bank. It was a report that was made to the officers of the bank each day for their guidance in operating the bank.

Referring to plaintiff's Exhibits 11 to 18, inclusive, these are published certificates required of the Phillips State Bank, published in the paper in accordance with the law. The figures in the corner originated from the general books of the bank and they were prepared by the auditor and certified to by me and are true and correct in accordance with the books of the bank.

I know the defendant, Sam Howard, and have seen him at the bank. I do not recall when he made his first deposit. I do not recall, nor did I have anything to do with the taking out of the first depository bond of the bank. I had no discussion with Mr. Howard prior to his making such deposits. From August, 1930, to June 21st, 1932, I would see Mr. Howard in the bank possibly once every month and maybe not that often, I do not know. I should say that he came there with moderate frequency. Assuming that he lived at 6241 Winthrop Avenue, that is about a mile and a half from the bank and is on the North side.

The daily statement of the bank referred to was a transcript of the final balances on the general books of the banks at the closing of business on the preceding day, made up each evening after the closing of business.

Thereupon plaintiff withdrew its witness, Michael J. Long, temporarily.

153 KIERNAN O'CONNOR, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows on direct examination by Mr. Beebe:

I am a wardrobe clerk in the Chicago Public Library and I have brought in before me the Public Library file of June 7 and June 8, 1931, of the Chicago Daily Tribune.

The Defendants objected to the reading of these headlines as they have nothing to do with the Phillip State Bank & Trust Company and refer to the consolidation of other banks. Objection overruled and exception.

Plaintiff read into the record from the Chicago Sunday Tribune of June 7, 1931, the following: "Foreman Banks Reorganizing. Plans are told. New Institution to be formed." From the headlines of Monday, June 8, 1931, of said paper Plaintiff read into the record the following: "Big Look

Banks in Two Mergers. First National Bank Gets Two Foreman Institutions. Central Trust Company Unites with Bank of Republic." From the article appearing under said headlines the Plaintiff read as follows: "Most Important Series of Bank Mergers in Chicago Financial History Took Place Last Night. The First National Bank and its affiliate, The First Union Trust and Savings Bank, absorbed the Foreman State National Bank and its affiliate, The Foreman Trust and Savings Bank, safeguarding deposits of nearly two hundred million dollars in the Foreman Banks. The Central Trust Company of Illinois and the National Bank of the Republic also announced their consolidation as the Central Republic Bank & Trust Company."

The Defendants moved that all the foregoing matter be stricken from the record on the ground it has no bearing
154 on the issues of this lawsuit and is incompetent, irrelevant and immaterial. Objection overruled and exception taken and allowed.

No cross-examination.

Plaintiff's witness MICHAEL J. LONG resumed the witness stand and on cross-examination by Mr. Heth testified as follows:

The Bank had no difficulty in paying depositors that came in to withdraw their money in an unusual number from the Bank during the periods of 1931 that I testified to on direct examination designated as a slight run or considerable run and so forth. Every time the runs were made the Bank paid the depositors as quickly and as soon as they made their demands. Subsequent to their withdrawal, a great many of them came back and redeposited their money. In 1932 when any runs were made any person that came in and demanded their money was paid and the Phillip State Bank had no difficulty in meeting runs until the last run was made in June, 1932. There were not any so-called runs in 1932 prior to the one in June just before the closing of the Bank. There was a seepage of deposits after the closing of the Citizens' State Bank, as I recall, but the closing of this bank did not have any material effect on the Phillip State Bank. Coming down to the month of June, 1932, in the early part of that month, there was no indication to me or other officers of the bank or anywhere at all that there was any unusual condition so far

as banking conditions were concerned around the North Side or in the City of Chicago and on the morning of June 18th everything was as quiet and complacent and placid in the banking world as it had been for some time and there was
155 no intimation on the part of the public so far as I knew that there was going to be any run of any kind on the Phillip State Bank on June 18th. The run started one o'clock in the afternoon on June 18th and did not occur until after the Devon Trust and Savings Bank had closed. It continued during Saturday and after we had paid all depositors who came to the bank we closed the bank about 9:30 Saturday night. We did not close the bank until all the depositors who came there had been paid and were out of the bank. The run was resumed on the following Monday and continued off and on through the day. It was spasmodic. And on the morning of June the 21st we opened at nine o'clock and closed about nine-thirty. I went with the Central Trust Company in April, 1921, in the consolidation of that bank with the Bank of America. I had previously been connected with Greenbaum for some seven years, that is the American Bank. I remained with Central Republic until September, 1929, when I was sent out to the Phillip State Bank and Trust Company, indirectly by the Central Trust Company. My position in the Central Trust Company was an assistant to the officers and I went out to the Phillip State Bank as Cashier. Mr. Beutel was at the Central Trust Company at the time I was there in the capacity of Vice-President. The speech referred to in my direct examination by Mr. Beutel made at a meeting at the theater was made on the night that the Rogers Park Bank closed, September 21, 1931. I do not recall any details of the speech or the substance of it or anything.

On redirect examination by Mr. Beebe Plaintiff's witness MICHAEL J. LONG testified as follows:

The greatest amount of deposits that the Phillip State
156 Bank had was in the neighborhood of four million eight hundred thousand dollars in 1930. I do not recall whether it was in the early part of that year. I would not say as a banker that the condition of banks in Chicago commencing in August, 1930, and carrying on down to June 21, 1932, generally was placid.

Objection by the Defendants because the period covered on cross examination as to its placid condition was not from August, 1930, to June 21, 1932. Objection overruled. Exception taken and allowed.

LOUISE M. KLEIN, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified on direct examination by Mr. Beebe as follows:

I live at 7303 North California. At one time I was a depositor in the Phillip State Bank. I do not remember the number of years, but up to the time it closed, I was still a depositor.

Q. Was there any time that you withdrew a particular large amount of money?

Objection.

Q. In the year 1931.

Objection. Objection overruled. Exception taken and allowed.

A. I did, I drew a large amount of money on April 15, 1931, on which day I saw quite a number of people drawing out money and I believed it was a run so I figured I would draw the majority of what I had in.

Q. How much did you withdraw at that time?

Objection as immaterial. Objection overruled. Exception taken and allowed.

A. $2,340.00, and I left in the bank $4.60.

Q. Did you or did you not hear any rumors in that 157 neighborhood at the time you withdrew your money, referring to the question of the solvency of the Phillip State Bank and Trust Company?

Objection as immaterial and not binding on Defendant Howard. Objection overruled, exception taken and allowed.

A. I did. I heard that people were drawing their money out and I felt as though it would be safer to draw out most of mine and that is just what I did. I was not particularly interested after I had drawn out my money, and I don't believe I remember any other runs.

On cross examination by Mr. Heth Plaintiff's witness LOUISE M. KLEIN testified as follows:

I had a small sum of money in the Bowmanville Bank but did not draw it out. After I drew my money out of the Phillip State Bank I, of coure, did have some business to attend to such as getting and clipping coupons of bonds, but I never went there outside of that. I never made any investigation after that of the condition of the bank. Well, I did deposit

small amounts after that, just temporarily and withdrew it as I needed it. I remember depositing $45.00 at one time and thirty-six at another time and then I remember withdrawing ten dollars at one time and I believe I had fifteen dollars and some cents left sometime before the bank closed. From time to time after I withdrew the two thousand dollars, I made small deposits up until the bank closed. Yes, the Bowmanville Bank closed, I believe the same time the Phillip State Bank did. No, I did not put any of the two thousand dollars in the Bowmanville Bank. I put it in a safety deposit box.

158 Motion of the Defendants to strike all of the testimony of Plaintiff's witness Louise M. Klein on the ground it is incompetent, irrelevant and immaterial and has no bearing on the issues in this case and is not binding on the Defendants in any way. Motion denied. Exception taken and allowed.

AMY DEGERMAN, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified on direct examination by Mr. Beebe as follows:

I live at 2035 Greenleaf Avenue, Chicago. I deposited money in the Phillip State Bank over a period of years and had money in the bank when it closed. On April 15, 1931, I withdrew $400.00.

Objection by the Defendants on the grounds that testimony by this witness of withdrawal of money from bank is immaterial to the issues in this lawsuit and not binding on the Defendants. Objection overruled. Exception taken and allowed.

Witness: On the day I withdrew over four hundred dollars I went to the bank but I do not think I saw anything out of the ordinary. I did not see any people there withdrawing money.

Q. Prior to the time you went there on April 15th did you hear any rumors with reference to the solvency of the Phillip State Bank?

Objection as not competent or material to the issues of this suit. Objection overruled. Exception taken and allowed.

A. That is difficult to answer, it is too far away, too long since it happened. I had less than one hundred dollars in the

bank after I withdrew this four hundred which I decided to leave in the bank from then on.

159 No cross examination.

CATHERINE GOOSSENS, called as a witness on behalf of the Plaintiffs, testified on direct examination by Mr. Beebe as follows:

I live at 1624 North Shore Avenue about six blocks from the Phillip State Bank and Trust Company. I had a joint checking account with my husband in this bank. I withdrew some money from the Phillip State Bank one day but I do not remember the date. I heard there was a run on this bank so I went to withdraw my money but I don't remember whether I withdrew it all at that time. It seemed that I stood in line quite some time as there was a line about like from here to the jury box, some thirty feet possibly, and there were a great many people there in line at other windows as there was a run at the bank. I do not remember of any previous runs as it is too long ago.

The Defendants moved that all the testimony of this witness be stricken as being incompetent and immaterial. Motion overruled. Exception taken and allowed.

On cross examination by Mr. Heth, Plaintiff's witness CATHERINE GOOSSENS testified as follows:

I do not remember the exact amount I withdrew from the bank, it must have been a couple of hundred dollars or more, but I have no recollection as to the date and I don't remember whether it was in 1930 or 1931 or 1932. I do not remember whether I left any money in the bank but later on my husband put the money back and then we heard there was another run and my husband went and drew it all out, but I do not know whether that was the last run or whether it was previous or whether it was in 1930 or 1931 or 1932, as I

160 lost interest in the bank after we withdrew all our money.

MARGARET KAY, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified on direct examination by Mr. Beebe as follows:

I live at 7050 North Paulina Street, two blocks from the Phillip State Bank and Trust Company. I have banked at this bank and ceased doing business there the day of the first run when I withdrew my money. I think it was in June, I think it was about June 9, 1931.

Q. Did you hear any rumors in the neighborhood with respect to the solvency of the bank prior to the time you withdrew your money?

Objection by the Defendants. Objection overruled, and exception taken and allowed.

A. That morning I heard there was a run on the bank and I immediately went up and withdrew my money. There were just rumors in the neighborhood with reference to the run. Rumors now and then that the bank was in trouble.

Objected to by the Defendants. Objection overruled, and exception taken and allowed.

Witness: I knew of other runs afterwards, but was not interested. We left a small amount in the bank and I thought if it ever came back I would redeposit money we had withdrawn but it never did.

Motion by the Defendants that all the testimony of this witness be stricken as incompetent, irrelevant, immaterial and not binding on Howard in this case. Motion denied. Exception taken and granted.

No cross examination.

161 HENRY FELTES, called as a witness, on behalf of the Plaintiff, having been first duly sworn, testified on direct examination by Mr. Beebe as follows:

I live at 1949 Estes Avenue and my place of business is 7055 North Clark Street which is about a block and a half from the Phillip State Bank & Trust Company. I have been at this place of business since 1908. I used to be in the painting and decorating business and am now in the painting and wallpaper business. I had a store at 1763 Greenleaf Street until 1911, then I moved over to 7055 North Clark Street and was there during the period from 1930 to 1932. I deposited

money in the Phillip State Bank. During 1931 there was only one run on the bank that I noticed.

The Defendants object to witness testifying about the run as being incompetent and irrelevant and not binding on Howard in this case. Objection overruled. Exception taken and allowed.

Witness: The only run that I really remember was a big run in April, 1931, somewhere around the time the Builders and Merchants' Bank and Trust Company and the Northtown State Bank failed. I saw a lot of people in the bank at that time while I made a deposit, a lot of people standing around that I knew and spoke to that were standing in line. I cannot say that I observed anything at the Phillip State Bank about the time the Sheridan Trust failed. I was not near the Phillip State Bank for a couple of days after the Rogers Park National Bank failed.

Q. Were there any rumors in the neighborhood that you knew of in the year 1932?

A. That is all we did hear, was rumors.

162 Objection by the Defendants as being incompetent, irrelevant, immaterial and a conclusion of the witness. Objection overruled. Exception taken and allowed.

A. I say that is all we did hear, was rumors; one said it was O. K. and one said it was not. There was much discussion in the neighborhood as it was the talk of the neighborhood at the time. It was currently talked for several days. There was an awful lot of talk about it in April, 1931. After that time it seemed to quiet down and all the businessmen, we thought it was safe. We didn't want to see any bank go out of our neighborhood?

Q. You were interested in having a bank up there?

A. Certainly was.

Objection by the Defendants as leading the witness.

Witness: I attended a meeting at the Adelphi Theater and I think it was filled.

On cross examination by Mr. Heth, Plaintiff's witness HENRY FELTES testified as follows:

Yes, I recall a run about April 12th, 1931, at the time the Builders' Bank closed and I made a deposit in the Phillip Bank at that time instead of making a withdrawal. I heard of lots of runs in other banks around there at that time. I

heard rumors about every bank. I would not say I heard as many rumors that the Phillip Bank was safe as it was unsafe, but it seemed a lot of people were upset and being in business there I wanted to see a bank there and I had all the faith in it and left my money in it. I would not say I had confidence, but I did not want to see the bank go out of the neighborhood. I kept on making deposits in the bank right up until it closed.

163 E. J. MORRIS, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified on direct examination by Mr. Beebe as follows:

I live at 6953 Morton Street on the North Side and prior to the closing of the Phillip State Bank was associated with it as receiving teller for a few years and paying teller, chief clerk, assistant auditor and then auditor. From August 1930 to June 10, 1931, I was assistant auditor and had to do with the records and files of the office. Sometime in April, 1931, there was a run on the bank and also in September, 1931, and I believe there was one in June, 1931, I think it was around the time that the Builders' and Merchants' Bank and Trust Company and the Northtown and Lincoln Trust closed. I do not remember just what effect the closing of the Sheridan Trust had on the Phillip Bank. I do not know when the Fullerton, Sheridan Trust, Elston State, Northwestern Trust and Savings Bank, the Second Northwest Trust, the Diversey Trust, went up and I do not believe that they would have a very remarkable effect on the Phillips'.

I do not remember now just what effect the taking over of the Foreman with the First National had, but I can refer to the records and tell you.

Q. At the time or just before the bank closed, did you have anything to do with any attempt to change the character of deposits of Howard in the Phillip State Bank and Trust Company from ordinary commercial accounts to trust accounts? Did you have anything to do with anything of that character?

The Defendants objected to the form of the question, to the use of the word "Attempt" or the words "attempt
164 to change." Objection overruled. Exception taken and allowed.

A. Yes, I did. Yes, there was an effort of that character.

The three lists or three documents which you have handed me, these two books and a package of documents are pencil copies of our daily condensed statement of condition and were made up for the benefit of the officers of the bank to see the condition of the bank at the close of business each day and are true and correct.

The Defendants reserve objection thereto if and when offered as being incompetent, irrelevant and immaterial to the issues of this case and not binding upon Mr. Howard.

Witness: During the period from August 30 to June 21, 1932, the Illinois State Bank of Evanston was taken over by the Phillip State Bank and Trust Company. It was located on Howard Street on the Evanston side. The daily reports would reflect that condition. I think this was done July 31, 1931. Explaining the statement that you handed me of the bank of July 29th, 1931, the 176,604.01 represents loans payable on demand secured by collateral. "Time collateral loans" are loans secured by collateral due on a definite maturity sometime after the date of this statement; they totaled 503,740.63.

Objection by the Defendants to all of this line of testimony on the ground that it is incompetent, irrelevant and immaterial and not binding on Mr. Howard.

A. "Demand unsecured loans" means loans due on demand without security. "Time unsecured loans" are the same, loans due on a definite maturity it being unsecured. "Commercial paper" represents trade paper of large 165 concerns purchased that draws a nominal rate of interest. "Individual overdrafts" means overdrafts of commercial accounts of the bank. I recall that Sam Howard was permitted to have overdrafts at the bank. I don't know that he had more overdrafts than all of the rest of the overdrafts in the bank. "Stocks and bonds" represents the bank's investments in stocks and bonds, and are general bonds of the corporate type, and railroads and such like, public utilities. "United States and Municipal bonds" are carried as a separate total. "Phillip Safety Deposit Company" represents the Phillip ownership of the entire capital stock of the Phillip Safety Deposit Company. "Real estate mortgages" represents the bank's investments in real estate mortgages or mortgages secured by real estate. "Real estate bonds" represents the bank's ownership of bonds secured by trust deeds on real estate. "Other real estate

owned'' represents the bank's investment in real property which it has taken title to. ''Bank building and equipment'' represents the investment in the equipment only of the bank. ''Furniture and fixtures'' represents the investment in the furniture and fixtures in the bank building. ''Due from bank'' represents the cash it carried in accounts in other banks. ''Sundry debits and credits'' in this case 367.70 represents sundry items that cannot be properly allocated elsewhere. ''Cash'' means what it is. ''Cash items'' are sundry coupons, checks and so forth that are held pending settlement of some kind. ''Other resources'' represents all other assets not classified as above. On the liability side ''Capital stock'' represents the capital stock of the bank, liability to stockholders. ''Surplus'' is the fund provided by law, 166 carried in banks. In this case it is $200,000.00. ''Undivided profits'' represents the earnings of the bank not distributed. ''Current earnings'' in this case represents the earnings for the month to date. ''Contingent fund'' is a reserve account for which we charge off doubtful assets. ''Reserves'' in this case they are grouped, they consist of reserves for depreciation of the furniture and fixtures and mechanical equipment of the bank. ''Official checks'' represents cashiers' checks, certified checks and trust checks outstanding. ''Individual deposits demand'' represents all deposits which a demand could be made on of the bank subject to check. ''Individual deposit time'' are certificates of deposits, ''savings deposits'' are deposits placed in the savings department subject to withdrawal on which the bank could require notice. ''Christmas Club'' are regular Christmas Club deposits which are made weekly and paid out at the end of the year. ''Bills payable'' represents notes that the bank owed for money borrowed. And if the bank borrowed money from a downtown bank at a particular time, that would be shown in bills payable. ''Other liabilities'' represents miscellaneous liabilities not included above. ''Cash reserve required'' is the amount that we were required to carry by law, which represents a certain percentage of our demand deposits and a certain percentage of our time deposits. I think it was eighteen percent on commercial deposits and six percent on savings deposits. ''Excess or deficiency'' is where our ''cash and due from banks'', if it exceeds the reserve required, the excess would show in the next column, and if there was a deficiency it would go in the line below. Down

below there are three lines for loans, which shows the
167 increase or decrease over the previous day. "Individual deposits" shows either an increase or a decrease, that means whether they have gone up or gone down from the day previous. The same with savings deposits. And then the bottom line is the total deposits of the bank. That is where all of the deposits are consolidated into one total. After the Illinois State Bank was taken over the Illinois State Bank liquidating fund is carried, the amount being $207,444.08, which indicates the increase in assets that the Phillip secured by taking in that bank. Naturally our liabilities increased the same amount. The expression "accrued income" means earnings that we were making that we had not collected on and we accrued them each day because our statements show our earnings each day right through the months, show we accrued our income on items of that sort. Based on these particular matters there was a statement made to the advisory board of the bank from time to time.

Objected to by the Defendants because incompetent irrelevant and immaterial and not bearing upon the issues and having no relation to Mr. Howard's situation and no notice to him. Objection overruled. Exception taken and allowed.

Witness: Statement of overdrafts were made to the advisory board each month and the statement shows the dates of the overdrafts.

Thereupon Plaintiff offered the page showing statement of overdrafts in evidence and asked leave to withdraw it and have it read because it is the original copy of the bank's records.

Thereupon the Defendants objected on the grounds that it is incompetent, irrelevant and immaterial to the issues and has no bearing thereon, and that if attempt to prove overdrafts by Howard, there is no proof that
168 the statement is true and correct, but if attempt to merely show what the books of the bank showed there is no objection that the bank's books show this.

Thereupon the Plaintiff announced that the purpose of the offer was to show the bank extended to Mr. Howard the privilege of overdrafts on particular bankruptcy accounts.

Thereupon the Court admitted the document and the Defendants objected thereto which objections the Court overruled to which the Defendants excepted, which exceptions were allowed.

Thereupon witness read into the record the following statement:

A. (reading) "Phillip State Bank and Trust Company. Overdrafts as of 12 & 31. Name," and then there is "Comments" and "Amounts". "Eagle Cleaners and Dyers." Comments are, "Will deposit." The amount, 164.82.

Q. That is not a Howard matter?

Witness: "Sam Howard for Wallace Stationery, other accounts cover 33.39." "Sam Howard for Wortheimer & Company, other accounts cover, 57.92." "Sam Howard for Robert H. Davis, other accounts cover 3.12." "Sam Howard for National Theaters Corporation, other accounts cover 1.87." "Sam Howard for Steven Krysinske, other accounts cover, 17.72." "Sam Howard for William R. Pelinka, other accounts cover, $285.00." "Sam Howard for Star Hat Works, other accounts cover, 1,181.76", total 1,745.60.

On cross examination by Mr. Moses Plaintiff's witness E. J. MORRIS testified as follows:

The expression "other accounts cover" means Mr. Howard carries a number of other accounts at the bank that have sufficient balances in them to offset this amount. These were overdrafts in trustee and receivership estates and deposits were made to cover them.

Q. I notice listed under liabilities is capital stock 169 $500,000.00. Now is that a debt due by the bank?

The Court: Well, it is not, of course.

Mr. Moses: I merely want to make it clear to the jury.

The Court: I could make that clear.

Mr. Moses: Very good.

The Court: That is, I can make that as clear as you know it ought to be without your asking.

Mr. Moses: If your Honor will make it clear when you come to the charge I am perfectly satisfied.

The Court: All right.

Mr. Moses: I would like to ask the same question, if your Honor please, as to surplus and undivided profits, and current earnings, contingent funds and reserves.

The Court: Well, the bank may be under a liability. There is no question about that at all.

Mr. Moses: Very well, that is all. I now ask to strike out all of this evidence as it is entirely irrelevant and immaterial

under the issues in this case, no connection being shown with Mr. Howard.

Motion denied, and exception taken and allowed.

On redirect examination by Mr. Beebe Plaintiff's witness E. J. MORRIS testified as follows:

Yes, by overdraft is meant that all of the money that was on deposit in a particular estate had been exhausted and there was owing to the bank by way of overdraft at that time the amount shown in this particular statement. I mean by "other accounts cover" that so far as the bank was concerned it had other bankrupt accounts that had money in them more than to cover this amount.

On recross examination by Mr. Moses Plaintiff's witness E. J. MORRIS testified as follows:

No, I do not mean that I treated the other account to the credit of Mr. Howard, any bankruptcy estate, separate and distinct from these bankruptcy estates as other accounts
170 to cover. Mr. Howard had other accounts in the bank; that it should not have been used; the fact that there were other accounts would have nothing to do with this particular overdraft and I mean by my answer other accounts to cover; that Howard had a special account and a general account in the bank and an amount to his credit in these accounts that exceeded these overdrafts. That is the situation in general. That is what it would mean, I suppose. I do not know just on that day whether he had or not. I imagine he had. He carried a fairly good account. I mean by the expression "Other accounts" just what Mr. Beebe said, that other trustee and receivership accounts had exceeded the amounts that were overdrawn in these accounts. No, the bank did not carry these items on the books as though those accounts could be used to cover these accounts. Well, I mean by the expression "other accounts to cover" just what I said, that there were other accounts belonging to other estate which exceeded the amount of these overdrafts.

171 HENRY W. FREEMAN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified on direct examination by Mr. Beebe, as follows:

I am Clerk of the United States District Court for the Northern District of Illinois and we have made a search in my office of the files to see whether any reports were made between August 1st, 1930, and June 21st, 1932, with reference to the amount of money that Sam Howard had on deposit in the Phillips State Bank and Trust Company in all accounts as receiver and trustee in bankruptcy. I did not personally make this search but it was made under my direction. We found an envelope in the vault concerning reports of receivers during those periods and among these are two or three, I believe, by Sam Howard. Between August 1st, 1930, and June 21st, 1932, I think there is only one by Mr. Howard but I will make a further check. (Witness looked through file and handed paper to plaintiff's attorney).

Q. That seems to be a report to a clerk, does it not? Who is that person the report is to?

A. It is directed to Joseph A. Muir, who was at that time Chief Deputy Clerk in the Clerk's office. I found no other reports than this during that period of time by Mr. Howard.

On cross examination by Mr. Heth, plaintiff's witness, HENRY W. FREEMAN, testified as follows:

The envelope I have in my hand containing these reports is an envelope purporting to be from the chambers of Judge George A. Carpenter which was found in the vault of the Clerk's office. There appears of record in the Clerk's office an order dated June 11th, 1931, directing receivers and trustees to file reports as to the total amount on deposit with the depository. This appears to be the only order made during that period of time and the order was entered by Judge Carpenter. Referring to the report that I found in this file of Sam Howard's, it is dated June 9th, 1931, and I first saw the envelope that I now have about a fortnight ago. I was with Mr. Scherer, the cashier, when he opened the drawer and found it in the lower drawer of some steel drawers that are in the vault back of the cashier's cage in the Clerk's office. Prior to the time I found this envelope I had been

requested to search the records of the Clerk's office for any reports of receivers and trustees. I think the first
172 request was from Mr. Moses about two months ago. My recollection is that he had already spoken to Mr. Scherer and I told Mr. Moses we had made a search and we could not find any. I recall that about two weeks ago Mr. Moses and Mr. Heth called on me and asked me to make another search to see if I could find any reports of receivers filed in my office showing the total amount on deposit in the various depositories and I sent Miss Gilmour, one of the clerks, back into the vaults to see if she could find some, but she did not. You are refreshing my recollection as to whether it isn't true that Miss Gilmour brought out a number of reports and put them on her desk before Mr. Scherer returned. Those are subsequent reports. Yes she found some and in those I believe there appeared a number of reports of receivers and trustees for the year 1931, we have the file there and could produce it. Those were kept in a rack on the side of the steel case in the vault. No that was not the first time I had seen those reports, they came in regularly and I stamped and filed them as they came in. Oh, you mean the reports of 1931, yes that was the first time I had ever seen them, I do not know where they came from. Those not in the envelope were kept in the vault—loose, in this rack. I think I can tell you how reports were kept. Those reports that were in there stamped with the file mark of the clerk, were evidently filed in the clerk's office; most of the reports in here bear no file mark. I think practically all of the reports that I found on the day that Mr. Moses and I went in there bear a file mark of the clerk but I would not say so without examining them again. I do not recall that there were two envelopes that were with those reports that Miss Gilmour and I brought out of the vault and showed to Mr. Moses and Mr. Heth. I told Mr. Heth and Mr. Moses at that time that I had had a search made of the vault, the entire office, to determine whether there were any other reports in the office that had been filed by receivers and my recollection is that they stated that they did not know where the envelope that Judge Carpenter's secretary had containing receivers and trustees reports had been turned in. That they had been informed that it had either been turned over to the Clerk's office or to Judge Wilkerson or some other person, and they requested me to make a search in my office to see if we could find the envelope and I think Mr. Moses at that time said that Miss Howard, Judge

Carpenter's secretary, claimed that she had turned over an envelope to the clerk's office containing reports of re-
173 ceivers and trustees. I then made another search at the clerk's office to find that envelope and I did not find it that afternoon. Mr. Scherer said to me that "There is no place in this office where that envelope could be. There is only one drawer that is used for exhibits where I could possibly put anything." And he stepped into the vault and opened the drawer and he threw his hands up to his head, and there was the envelope. Yes, that is the envelope I have produced here and that is in my possession now and bears the legend "Reports of Receivers of Funds in their Hands with Banks", and these are the contents.

Q. Now, will you let me see that report of Howard's that you say you found there?

A. Yes, sir.

Thereupon, said report being a letter dated June 9th, 1931, to Joseph A. Muir, Chief Deputy Clerk, was marked DEFENDANTS' EXHIBIT 1, for identification.

174 A. Yes, defendants' Exhibit 1, for identification, was one of the documents that I have just referred to. Yes, I know by information that there were other searches made than those that I have described, in my office under my direction, to find out whether there were other reports filed by Sam Howard or other receivers. I did not see the searches made but I know that Mr. Scherer and others made searches of the office. I am not sure whether Mr. Claussen, the clerk here in this court room, made a search or not. He reported to me that he found a single report of Sam Howard in some book that was in the drawer, that he had.

On redirect examination by Mr. Beebe, plaintiff's witness, HENRY W. FREEMAN, testified as follows:

I talked with Mr. Beebe along in March or April on the same subject matter, at which time we discussed the search for these matters.

On recross examination by Mr. Heth, plaintiff's witness, HENRY W. FREEMAN, testified as follows:

I am not sure whether I knew these reports were in the vault and loose in the rack or not at the time I talked with Mr. Beebe about searching for the files. I doubtless referred

him to Mr. Scherer. I do not remember the conversation with Mr. Beebe particularly. I became Clerk on the 4th of March, 1935, and if this was shortly afterwards I probably did not know it at the time I talked with Mr. Beebe, but I do not recall.

On further redirect examination by Mr. Beebe, plaintiff's witness, HENRY W. FREEMAN, testified as follows:

I cannot fix the date, Mr. Beebe, that you came in and asked me about this matter. I know it was some time ago. I must confess that I do not even remember that Mr. Scherer came in and you produced a large number of these reports with stamps on them, none of them back of 1933.

Mr. Heth: Were all of the reports that you now have in your hands in that envelope at the time it was found?

A. Yes.

It was admitted that a Mr. Wilkinson from the State Auditor's office would testify that the last day on which the Lake View State Bank, of 3179 North Clark Street, did business was September 20th, 1930; that the Builders and Merchants Bank and Trust Company, a consolidation of the Builders and Merchants State Bank, at 5157 North Clark Street, 175 and the Capital State Savings Bank at 5437 North Clark Street, consolidated November 12th, 1930, the last day of doing business was April 11th, 1931; that the last day on which the following named banks did business is as follows: Northtown State Bank, corner of Western and Devon Avenue, April 13th, 1931; Lincoln Trust and Savings Bank, Irving Park Boulevard and Lincoln Avenue, April 15th, 1931; Boulevard State Savings Bank, 2621 Irving Park Boulevard, April 15th, 1931; Fullerton State Bank of 1243 Fullerton Avenue, June 4th, 1931; Sheridan Trust & Savings Bank, 4753 Broadway, June 8th, 1931; Elston State Bank, 4332 Elston Avenue, June 9th, 1931; Northwestern Trust and Savings Bank, 1201 Milwaukee Avenue, June 9th, 1931; Second Northwest State Bank, 2956 Milwaukee Avenue, June 9th, 1931; Diversey Trust and Savings Bank, 1166 Diversey Parkway, June 12th, 1931; Noel State Bank, 1601 Milwaukee Avenue, June 18th, 1931; Kimball Trust and Savings Bank, 3600 Fullerton Avenue, January 16th, 1931; Citizens State Bank of Chicago, 3228 Lincoln Avenue, May 25th, 1932; De-

von Trust and Savings Bank, Clark and Devon, June 18th, 1932.

To all of which testimony the defendants objected on the grounds that it is incompetent, irrelevant and immaterial and not binding on the defendants, which objection the court overruled, to which ruling an exception was taken and allowed.

It was also agreed that a Mr. Oberworkman, Chief National Bank Examiner, would testify to the following closing dates of the following named banks: Rogers Park National Bank, 6979 North Clark Street, September 21st, 1931; South Side Trust and Savings Bank, June 8th, 1931; Washington Park National Bank, June 8th, 1931; Jackson Park National Bank, June 23rd, 1931; Ogden National Bank, September 28th, 1931, and that these are all outlying banks.

Objection by the defendants to all of this testimony on the grounds that it is incompetent, irrelevant and immaterial to the issues in this case and not binding on Mr. Howard. Objection overruled, except taken and allowed.

ERNEST W. LUDLOW, a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified, on further direct examination by Mr. Beebe, as follows:

The sheet that you have just handed me and that is marked plaintiff's Exhibit 20, for identification, is a summary of certain records of the Phillips State Bank and I now have those records here in court and they are the records that were in the hands of Mr. Morris while he was on the witness stand.

176 Thereupon the defendants stated that they made no objection to the form of the document as not being the best evidence or to the figures contained on it as not being correct and properly taken from tabulations here in court, but that they objected to its offer because it is incompetent, irrelevant and immaterial and is not binding on defendants and has no bearing in this case. Objection overruled. Exception taken and allowed.

Thereupon said document was received in evidence as PLAINTIFF'S EXHIBIT 20 and is in words and figures as follows, to-wit:

Resources	9/30/20	9/30/20	12/31/20	12/31/20	12/31/20	12/31/19	12/31/19	12/31/19	12/31/19	12/31/19	12/31/19	12/31/19	12/31/19
Loans & discounts													
Call Loans													
Time Collateral Loans													
Time "													
Mortgages Unsecured Loans													
Time "													
Commercial Paper													
Real Estate Collateral Loans													
Total Loans and Discounts													
Mortgages & Overdrafts													
Treasury Bonds													
Bonds, Stocks & Municipal Securities													
Philippine Islands Deposit & Other Investments													
Real Estate Mortgages													
Real Estate Rents													
Bank Bldg & Furniture													
Furniture & Fixtures													
Exchanges Bonds													
Other Real Estate Owned													
Cash													
Cash Items													
Other Resources													
Total Resources													
Liabilities													
Capital Stock													
Surplus													
Undivided Profits													
Current Earnings													
Contingent Funds													
Reserves													
Affiliated Banks													
Individual Deposits subject to Check													
Time Deposits													
Savings Deposits													
Certificates of Deposit													
Cashier's Checks													
Bills Payable													
Rediscounts													
Total Liabilities													

178 Witness: I was in the court room at the time Mr. Morris testified and these are the items he testified to as being on these reports and this is a summary of these various items so that his explanation will fully apply to this Exhibit No. 20.

Thereupon the plaintiffs rested their case in chief..

Thereupon the defendants asked to be heard on a motion to direct a verdict in their favor and the court announced that it had never heard anyone on a motion of that kind in an action at law in the Federal Court; that the Federal Court, in an action at law, has not the power to grant a compulsory non-suit at the close of plaintiff's testimony; that if the defendants wanted to elect to stand on the proof finally the court would hear them on the motion. The defendants, declining to elect to stand on the proof finally in making such motion, moved that all of the evidence be excluded from the jury and that a verdict be directed and finding issued in favor of the defendants, which motion the court refused to entertain except as to striking all evidence, and denied the same but not solely on the ground that defendants refused to stand on the proof finally, to which ruling the defendants took exception which was allowed. Thereupon the defendants moved to strike all evidence because it does not show a cause of action against the defendants. Motion overruled, the court stating that upon the proof here there may be a jury question. Exception taken by the defendants and allowed.

Thereupon the defendants moved to strike all evidence as being incompetent, irrelevant and immaterial to the issues in this case and because the complaint in this case alleges that the Phillips State Bank and Trust Company was a duly designated depositary in bankruptcy and continued as such, and the funds in question were deposited in a duly designated depository and were on deposit therein at the time the bank closed, wherefore the complaint shows on its face there is no liability on the part of the defendants. Motion denied, exception taken by the defendants and allowed.

Thereupon the defendants moved further to strike all evidence, other than that relating to the deposit of funds, because the evidence shows that the funds in question were deposited in a duly designated depository and were on deposit therein at the time it closed. Motion denied, exceptions by defendants taken and allowed.

Thereupon the defendants moved to strike all testi-
179 mony relating to the condition of the Phillips State Bank

and Trust Company, first, because there is no proof or showing that the defendant, Sam Howard, had any notice or knowledge of the facts that have been proven with reference to the condition of the depository; second, because the testimony offered by plaintiffs does not show that the Phillips State Bank and Trust Company was in an unsafe or unsound condition, and because there is no testimony offered by the plaintiff showing that said depository was in an unsafe or unsound condition; third, because there was no duty on the defendant, Sam Howard, to investigate or determine the condition of said depository. Motion denied. Exceptions taken by the defendants and allowed.

Thereupon the defendants moved to strike all testimony as to rumors or reports or public statements as to the condition of the Phillips State Bank and Trust Company because there is no proof that Howard had notice or knowledge of said rumors and because the testimony offered was of a character as likely to come to the attention of the bankruptcy court as to the attention of the defendant, Sam Howard. Motion denied. Exceptions by the defendants taken and allowed.

Thereupon the defendants moved to strike all testimony as to other depositories or depository bonds for the reasons assigned in their original objections to said testimony and for the further reason that by virtue of the fact that there is no averment in the complaint that there were other designated depositories or other depository bonds, the defendants are taken by surprise; and on the further ground that there is no proof showing or tending to show that there was a duty on the defendant to deposit the funds in question in any other depository, or that the other depositories were safer or more secure than the Phillips State Bank and Trust Company. Motion denied. Exceptions taken by the defendants and allowed.

Thereupon the defendants, in order to maintain the issues in their behalf, introduced the following evidence, to-wit:

The defendants offered in evidence as defendants' Exhibit 1A an order entered by Judge Carpenter on August 20th, 1930, designating the Phillips State Bank and Trust Company as a depository for bankruptcy funds, which offer was received and which order, so received in evidence, was marked DEFENDANTS' EXHIBIT 1A, and is in words and figures as follows, to-wit:

180 DEFENDANTS' EXHIBIT 1.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois

Eastern Division.

In the Matter of the Petition of Phillip State Bank and Trust Company, of Chicago, Illinois, to be designated by the Court as a Depositary for the Money and Funds of Bankrupt Estates.

ORDER.

This cause coming on to be heard on the petition of Phillip State Bank and Trust Company, of the City of Chicago, County of Cook and State of Illinois, to be designated as a Depository of money and funds of bankrupt estates, and upon reading the verified petition the Court, on the faith of the representations made in said petition, makes the following order:

It Is Hereby Ordered, Adjudged and Decreed that Phillip State Bank and Trust Company, of Chicago, Illinois, upon the approval of this Court of a good and sufficient bond, be designated and qualified as a Depository of money and funds of bankrupt estates.

And now Phillip State Bank and Trust Company, having offered its bond in open court, said bond being in the sum of Fifty Thousand Dollars ($50,000.00) and said bond being signed by said Phillip State Bank and Trust Company, as Principal, and The Fidelity and Deposit Company of Maryland, as Surety, It Is Hereby Ordered, Adjudged and Decreed that said bond is hereby accepted and approved and that said Phillip State Bank and Trust Company is hereby appointed and designated as a Depository for the money of bankrupt estates.

Enter:

CARPENTER
Judge

Dated Aug. 20, 1930

181 It was agreed that the petition asking for the designation of the Phillips State Bank and Trust Company as a depository might also be received in evidence.

The substance of the order designating the bank as a depository was stated.

It was stipulated and agreed that the defendant, Sam Howard, as trustee and receiver in bankruptcy, filed reports in the various separate estates in bankruptcy wherein he was trustee and receiver from time to time in the ordinary course of his receivership and trusteeship, showing the amount that he had on deposit in said various separate estates and showing that the funds of said estates were on deposit in the Phillips State Bank and Trust Company.

JOSEPH A. MUIR, called as a witness on behalf of the defendants, having been first duly sworn, testified on direct examination by Mr. Heth, as follows:

I live at 2643 South 60th Court, in Cicero, Illinois. During the years 1930, 1931 and 1932 I was Chief Deputy Clerk of the Federal Court, Northern District of Illinois. I held that position for about fifteen years, being Chief Deputy for about nine and a half years. We had the various depository bonds in the vaults under our custody. I am generally familiar with the amounts of the bonds that had been filed by the various depository banks of Cook County. During the latter part of May or the early part of June, 1931, I had a conversation with Judge Carpenter.

Objection by the plaintiffs. Overruled. Exception taken and allowed.

A. Judge Carpenter, during the year 1931, was one of the judges of the District Court for the Northern District of Illinois. He was senior judge at that time. I had a conversation with him at that time in his chambers in reference to depository bonds and the subject of the amount of money in banks by receivers and trustees. I do not know that I can fix the particular date. It was either in May or the first part of June. I do not think anyone was present.

Q. What did you say to him and what did he say to you?

Mr. Beebe: I object to that. It is immaterial.

The Court: Objection sustained.

Mr. Heth: Possibly the court does not understand the theory on which I am offering this. I want to show that this

whole situation was brought to the attention of Judge Carpenter, and that Judge Carpenter directed him to do certain things, which he did, and which receivers did, pursuant to that conversation. I want to show that he knew the situation with reference to what depository bonds had been given,
182 the amount of them, the amount on deposit by the various receivers and trustees in bankruptcy, and of the general situation with reference to banks; pursuant to that talk an order was entered, drafted by Mr. Muir.

The Court: The order will speak, and not any conversation between this witness and the judge.

Mr. Heth: Well, your Honor, even independent of the order, if information is brought to the attention of the court, whether it be by order or by conversation, or what not—

The Court: Well, the order will speak and not anything else, anything that was said to the judge or by the judge.

Mr. Heth: I may not want to offer the order in evidence. It is a question of Judge Carpenter's knowledge of the situation and knowledge of the fact that there was an amount on deposit in the Phillips State Bank.

The Court: The ruling will be the same.

Mr. Heth: Exception.

Witness: Subsequent to that conversation I drafted an order at the request of Judge Carpenter.

Plaintiffs object because it is immaterial at whose request the order was provided. Objection sustained.

A. Yes, I have seen the original of this order, marked plaintiff's Exhibit 2, for identification.

Thereupon the defendants offered said document in evidence and the same was received in evidence as DEFENDANTS' EXHIBIT 2 and is in words and figures as follows, to-wit:

183 DEFENDANTS' EXHIBIT 2.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

It Is Hereby Ordered that each and every Receiver of this Court is hereby ordered and directed to file with the Clerk of this Court a true and perfect financial statement of the amount of monies deposited by him with the depository banks of this Court on each first Monday of the third term day of

the United States District Court of this District, commencing July 1, 1931.

Enter:

CARPENTER
Judge

11th June 1931.

184 United States of America
Northern District of Illinois } ss:

I, Charles M. Bates, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Order entered June 11th 1931 now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago this 11th day of June, A. D. 1931.

CHARLES M. BATES
Clerk.

(Seal)

By .....
Deputy Clerk.

185 Q. Now, subsequent to your conversation with Judge Carpenter, what, if anything, did you do with reference to calling up various trustees and receivers in bankruptcy?

Objection by plaintiffs. Objection sustained and exception taken and allowed.

Mr. Heth: Now, your Honor, I want to make my offer of proof in this case on the instructions of Judge Carpenter, specific instructions of Judge Carpenter, he called up the receivers and trustees and told them that Judge Carpenter wanted them to file a statement of the amount they had on deposit, and that he did it.

The Court: Q. Did you file those statements?

A. Yes.

The Court: Did it make any difference whether this clerk told them as to the filing of the reports? I presume—

Mr. Heth: The pertinency of that is to show it came to the attention of Judge Carpenter.

The Court: Yes, I know. Judge Carpenter's order has been entered.

Mr. Heth: I know, but this was done before an order was entered, and independent of any order. He was doing something that the Judge told him that he wanted him to do.

The Court: Yes. Were reports filed?

Mr. Heth: Yes, your Honor.

The Court: That is the act that shows it was complied with, if anything does.

Mr. Beebe: I think the reports are the best evidence of whether they were filed, yes.

The Court: Yes, I think so.

Mr. Moses: May I make the suggestion here, if the Court please, that your Honor indicated this morning with respect to a letter that was shown, which was produced by Mr. Freeman, that it was a letter addressed to Joseph Muir—

The Court: We are speaking now of reports that these trustees and receivers are asserted to have made to the court, and filed.

Mr. Heth: Your Honor, that is not the point that I am trying to make. Judge Carpenter asked Mr. Muir, personally, on his own behalf, to call up the various receivers.

The Court: On whose own behalf?

Mr. Heth: Judge Carpenter's. It has nothing to do with the order.

The Court: All right. Has it anything to do with the reports that were filed?

Mr. Moses: Not what your Honor calls reports.

The Court: One at a time.

Mr. Heth: I offer to prove that Judge Carpenter asked him to call up the receivers and trustees and to file a statement with the Clerk as to the amount they had on deposit. Mr. Muir did that; and that was prior to the execution and entry of this order.

The Court: Well, the order was complied with.

Mr. Heth: Yes, it was, but I am not directing my attention to that. I am talking about something before the order was entered. I am not bound by the order, if something was done before the order.

186

The Court: It is not material. If the order was made and it was complied with, then the proof as to the compliance or alleged compliance or asserted compliance does not have to be offered.

Mr. Heth: Suppose there was no order entered?

The Court: Well, there was.

Mr. Heth: I know, but not at the time this conversation took place, nor that Howard did what the court requested him to do. In other words, suppose that Judge Carpenter, your Honor, had asked Mr. Howard to tell him the amount he had

on deposit in the Philips State Bank, and Mr. Howard went up to his chambers and talked to him and told him, wouldn't that be material in this case?

The Court: No.

Mr. Heth: To show that the court knew the amount that was on deposit in the bank?

The Court: No.

Mr. Heth: Your Honor, that is the very basis upon which the court increased the amount of the bond. The order had nothing to do with this matter that I am discussing.

The Court: Well, you understand my ruling.

Thereupon the defendants again offered to prove by this witness that in the early part of June, 1931, Judge Carpenter asked witness to call up various receivers and trustees in bankruptcy in this district and to file a statement as to the total amount they had on deposit in various banks designated as depositories and that Mr. Muir called up Mr. Howard, among others, and told him what Judge Carpenter had asked, and that on the 9th day of June Mr. Howard filed a statement with Mr. Muir showing the total amount that he had on deposit in the Phillips State Bank, and that that statement—original letter, was shown to Judge Carpenter, turned over by witness to Miss Howard, who was the secretary of Judge Carpenter, and she, in turn, put it on his desk, and it was kept in the file in Judge Carpenter's office until he resigned.

Objection by the plaintiffs as being immaterial. Objection sustained. Exception taken and allowed.

Witness: I have seen defendants' Exhibit 1, for identification. It came from Mr. Howard.

Objection by the plaintiffs as immaterial and motion by plaintiffs to strike witness' answer as a conclusion.

Witness: I think it came by mail. I know Mr. Howard's signature and that is his signature on it.

Q. After you received that document what, if anything, did you do with it?

Objection by the plaintiffs as being immaterial. Objection sustained and exception taken and allowed.

Thereupon the defendants offered to prove by this witness that after he received the document marked plaintiff's Exhibit 1 for identification, he turned it over to Miss Howard who was Judge Carpenter's secretary.

Same objection by the plaintiff, sustained, exception taken and allowed.

Witness: After the entry of the order of June 11th, 1931,

I received some reports from Mr. Howard showing the
187 total amount that he had on deposit in the Phillip State Bank & Trust Company. I recall that he came to the counter and filed one with me, and we stood there and talked about the order. That is what calls it to my memory, because he wanted an explanation as to just what the order meant. I cannot remember just exactly the time. It was some little time after the entry of this order, when he asked for an explanation. It might have been before the next term day and it might have been after, I do not recall.

To all of which testimony plaintiffs objected on ground it is immaterial. Objection overruled, exception taken and allowed.

Mr. Heth reads from the order of June 11, 1931.

Witness: The third term day of the United States District Court is the third Monday of the month. The first Monday of each month is the term day, except August and January. According to this order, reports were to be filed every three months. This was the phase of the order that I recall discussing with Mr. Howard.

Q. At that time what, if anything, did Mr. Howard do in reference to filing a report?

Plaintiffs object as not the best evidence. Objection overruled, exception taken and allowed.

Mr. Heth: I am laying a foundation for the non-production of the original; I am going to show the reports were lost.

Witness: Well, when we had that conversation Mr. Howard handed me an envelope with a report in it as I remember. I do not know what date it was. I turned the report over—

Plaintiffs object as immaterial. Objection overruled, exception taken and allowed.

A. If it was filed I turned it over to Judge Carpenter's secretary, Miss Howard.

Q. Do you recall any other reports that were filed by Mr. Howard at any time subsequent to the entry of this order, pertaining to the amount of money he had on deposit in the Phillip State Bank?

Objection by plaintiffs as immaterial and not the best evidence and as covering too wide a latitude because it may include the period after June 21st, 1932.

188 Mr. Heth: I am referring to the period from the date of the entry of the order until June of 1932.

Objection overruled, exception taken and allowed.

A. I remember a man from Mr. Howard's office filed a report but I do not remember the date. I received other reports of other receivers from time to time and turned them over to the judge's secretary, Miss Howard. Some of them were by mail and some of them were handed in personally. They were on a sheet of paper. Some were addressed to me, some were addressed to the clerk and some to Judge Carpenter and all that came into my possession I turned over to Miss Howard.

Objection by the plaintiffs as immaterial, and to any assumption there is some form.

Mr. Heth: The purpose is to show the loss and a foundation for the non-production of the original, to show the system by which all these reports were kept.

Mr. Beebe: I do not think the system shows anything.

Mr. Heth: The lack of system.

Mr. Beebe: Well, the lack of system.

Objection overruled, exception taken and allowed.

The Court: Why did you turn them over to Judge Carpenter's secretary?

A. That was for the information of the court and I marked those filed in my court. I made no entry on the minutes because there isn't any place to keep an entry in the minutes. I know of no envelope or any letter file or any receptacle that the clerk kept in his office for the purpose of keeping these reports as they came in. They were not, so far as I know, entered in any document, any register, or docket, or any book in the clerk's office at the time they were received. Yes, I was Chief Deputy Clerk at that time. I know of no one who was designated in the clerk's office by Mr. Bates to have custody or control of any of these reports that came in pursuant to that order. I did not designate any-
189 one to receive them. I could not say whether or not other people in the clerk's office besides myself received reports from receivers and trustees. If I was there in the office I would get them. I do not know of my own knowledge whether anybody else received them. I do not think any of the other clerks in the office ever handed any of them to me. Mr. Bates was clerk and if the reports came in by mail to the clerk they would come to me. I do not think Mr. Bates ever personally turned any of these reports over to me. His secretary used to bring the mail over and if they were in the mail I would get them. Some of these would come in the mail.

Mr. Beebe: The court understands I am not objecting, although this is not referring to Howard's reports. This is referring to reports generally.

Mr. Heth: No; this is for the purpose of showing lack of system in keeping these reports; laying a foundation for the loss of Howard's reports.

A. When reports came in to me I took them in to the judge's secretary immediately. I do not think I ever saw any of these reports after they were turned over to Judge Carpenter's secretary. I made a search of the clerk's office along in May or June of this year, 1935, at Mr. Howard's request to see if I could find any of these reports of receivers and trustees. Mr. Moses was with Mr. Howard at the time. I searched through the office and through the desks and through the vault but I did not find any reports. Mr. Scherer, the cashier, was with me at the time I made the search in the vault. Subsequently I made a search through my locker but found no reports.

Q. Directing your attention to a meeting in Judge Carpenter's chambers, do you recall at any time being in that office at that time that Mr. Howard filed a report, not with you but with Miss Howard?

Objection by the plaintiffs because not best evidence.

Objection sustained. Exception taken and allowed.

Mr. Heth: It is the same proposition. I am going to lay a foundation for the non-production of the original, proving that it was lost. I am going to prove that he did file one with Miss Howard.

The Court: All right, go on.

A. Well, I was in the judge's outer chamber and Miss Howard was sitting there.

Mr. Beebe: I made an objection in connection with that matter, if he did file one with Miss Howard, as not being in conformity with the order.

190 Witness: The reports I received I put the file stamp on the back of them except I could not say the ones I received personally were stamped. If they came by letter from the main office, I took them in without stamping them, that is some of them; that is, the first three or four months after the order was entered; after that they were all stamped, but for a time they were received without stamping.

A. Yes, I was there in Miss Howard's office when Mr. Howard filed a report with her.

Plaintiffs renew their objection.

Mr. Heth: I am going to show it was filed with Mr. Howard and lost.

The Court: Yes, but that is not a record in compliance with the order. Objection sustained and answer stricken.

Defendants except, which exception was allowed.

Defendants offer to prove by witness that he was present in the judge's chambers at a time when Mr. Howard filed a statement showing the total amount on deposit in the Phillip State Bank and Trust Company which statement was filed prior to the time the Phillip State Bank closed.

The Court: You are pursuing this line with the view of establishing the lost records?

Mr. Heth: Lost documents.

The Court: We are concerned here with records that were made pursuant to the terms of this order.

Mr. Heth: That is only a part of it. I am also trying to show things that were done that were not in compliance with the order which in my theory is just as—

The Court: Objection sustained.

Mr. Heth (Continuing): —admissible as those that were, just as if that information was obtained.

Mr. Moses: I make the further suggestion, that the derelication of the clerk to put a file mark on the document ought not to be a matter which would exclude the evidence.

It is the clerk's duty to attach a file mark. If he does not 191 that is no reason why evidence should be excluded, it seems to me.

The Court: Yes, but that duty must be performed.

Mr. Moses: But if the clerk fails to perform the duty, to put it on, it should not foreclose Mr. Howard from showing what the fact was.

Objection sustained. Exception taken and allowed.

Witness: The next time I saw any of these reports that I had turned over to Miss Howard was not until after Judge Carpenter had resigned and I saw them over with Miss Howard, that is, I did not see them, I saw them in the envelope. I saw the envelope with the reports in it, that is, presumed to be in it. I did not see the reports themselves I saw the envelope and saw it marked. I did not see the reports after that until the other day in the clerk's office.

On cross-examination by Mr. Beebe, defendants' witness, JOSEPH A. MUIR, testified as follows:

Yes, I saw an envelope in the hands of Miss Howard, Judge Carpenter's secretary, after Judge Carpenter resigned and I take it that is the same envelope that I saw afterwards. It looked the same. Well, I do not know that it is the same envelope that was brought into court this morning. I did not see the one that was brought in. Atfer this order was entered to file certain things I don't know of any record that I kept of the filings. They were filed and given to the judge which is a part of the court, a part of the clerk's office.

192 CELIA M. HOWARD, called as a witness on behalf of the defendants, being first duly sworn, testified on direct examination by Mr. Heth as follows:

I live at 375 E. Chicago St., Elgin, Illinois, and am secretary to Judge Phillip Sullivan, one of the U. S. District Judges. Prior to being Judge Sullivan's Secretary I was secretary to Judge Carpenter, a U. S. District Judge, and was Judge Carpenter's secretary during the years 1931, 1932 and 1933, up until July 1, 1933. I am not related in any way to Sam Howard, the defendant in this case. During the early part of June, 1931, I had occasion to receive, from time to time, reports of receivers and trustee as to the various amounts of money they had on deposit in depositories.

Plaintiffs object because immaterial, objections overruled, exception taken and allowed.

Q. From whom did you receive those reports?

Plaintiffs object as immaterial as she is neither a clerk nor a judge.

The Court: It is admitted solely on Mr. Heth's promise to establish the filing of reports with the clerk which are now claimed to have been lost.

A. I received them from the clerk's office. They were delivered to me instead of my going to the clerk's office for them. Mr. Bates and his secretary, Miss Foley, and Mr. Muir, personally, delivered the reports. I do not recall anyone else delivering any. After I received them I put them on Judge Carpenter's desk and they would later come back into my possession as Judge Carpenter would hand them back to me to be filed and I would file them.

An envelope was marked Defendant's Exhibit 3 for identification.

Witness: I have seen Defendant's Exhibit 3 for identification, before. It was in my file in which I put the various reports I have just been testifying about.

Q. Now, I show you a number of documents. I wish you would look at them. Are all the documents that were in that file documents that had been received by you and put upon Judge Carpenter's desk?

Mr. Beebe: We object to that as immaterial, not the best evidence, and the evidence as to reports of other receivers is entirely immaterial.

Mr. Heth: It is for the purpose of showing the system, as I said before.

193 The Court: She may answer, in view of her testimony that she received these from the clerk.

A. To the best of my recollection, yes.

Q. Now will you look at those files, those various writings you have there, and see if they bear the file mark of the clerk?

Objection because immaterial and not the best evidence and has no relation to the issues in this case, because it does not appear they are Howard's reports. Objection overruled, exception taken and allowed.

A. Some have the file mark and some have not.

Thereupon it was suggested that counsel go over the file and agree as to the number of reports marked filed and the number that were not.

Q. In this file you now hold, Miss Howard, appears Defendant's Exhibit No. 1 for identification. Do you recall whether or not you ever received that document?

Objection by plaintiffs as immaterial and because the document has been ruled out. Objection sustained, exception taken and allowed.

Thereupon the defendants offered in evidence DEFENDANT'S EXHIBIT NO. 1 for identification, to which offer plaintiffs objected on the ground it is immaterial. Objection sustained, exception taken by the defendants and allowed. Said Defendant's Exhibit No. 1 for identification being in words and figures as follows, to wit:

194 DEFENDANT'S EXHIBIT 1.

Receiverships
Trusteeships
Property Management
Foreclosure

Telephone Randolph 8147

SAM HOWARD
Suite 816 National Republic Bank Bldg.
134 So. La Salle St.
Chicago

June 9, 1931.

Joseph A. Muir,
Chief Deputy Clerk,
United States District Court,
Federal Building,
Chicago, Illinois.
Dear Sir:

In compliance with your request, I am pleased to submit herewith the banks in which I have funds on deposit as Receiver in the United States District Court.

Phillip State Bank & Trust Company,	$373,391.49
Foreman State National Bank,	$ 10,952.19

Yours very truly,

SAM HOWARD

SH:a

195 Thereupon the defendants offered to prove that Defendants' Exhibit 1, for identification, was delivered to and received by the witness.

Objection to the same sustained. Exception taken and allowed.

Thereupon a document was marked Defendants' Exhibit 4, for identification.

Witness: The document marked Defendants' Exhibit 4, for identification, was just taken from the file that I am now holding (being the receiver's and trustees' reports in the envelope mentioned above) and purports to be a compilation. I prepared it.

Q. After the document was prepared by you what, if anything, did you do with it?

Objection by the plaintiffs on the ground that no foundation has been laid and it does not appear when it was prepared or why it was prepared and so far it is entirely

immaterial. Objection overruled and exception taken and allowed.

A. I put it on Judge Carpenter's desk.

Q. Do you recall from what documents you got the information that is on that document, Defendants' Exhibit 4, for identification?

Same objection by the plaintiffs. Overruled and exception taken and allowed.

A. From the reports of the receivers.

Q. At whose request did you make up that document?

A. Judge Carpenter's.

Same objection by the plaintiffs. Overruled and exception taken and allowed.

Witness: I am not able, from looking at that document, to tell the time that it was made up. You have directed my attention to Defendants' Exhibit 1, for identification. I notice there the amount in the Phillips State Bank.

Q. Now, will you note the tabulation that you have made on this?

A. Yes.

Q. Now, after having looked at Defendants' Exhibit 1, for identification, are you able now to state as to what time, or approximately what time Defendants' Exhibit 4, for identification, was made up by you?

A. I should say it was sometime in the summer of 1931.

Objection by the plaintiffs as immaterial and motion to strike answer.

Mr. Heth: Now the court has not seen this document. I am offering it in evidence. It is a compilation showing what was on deposit in the Phillips State Bank, in the summer of 1931, which was shown to Judge Carpenter, and which she testifies is a compilation of receivers' reports.

Plaintiffs' objection renewed. Objection sustained. Exception by the defendants taken and allowed.

Thereupon the defendants offered in evidence the document marked DEFENDANTS' EXHIBIT 4, for identification, which document is in the following words and figures, to-wit:

196 DEFENDANTS' EXHIBIT 4.

Funds of Receivers on Deposit in the Following Banks:

Central Trust Company:		
Edwin D. Buell,	$ 39,798.14	
Maurice Klein,	86,109.62	
Frank McKey,	12,407.09	
Fred Hummel,	338,436.14	
Chester Willoughby,	412,111.88	$ 888,862.87
Foreman State National Bank:		
Edwin D. Buell,	$159,187.77	
Maurice Klein,	136,339.82	
Sam Howard,	10,952.19	
M. M. Martin,	24,903.98	$ 331,333.76
Continental Illinois Bank & Trust Co.:		
Maurice Klein,	$ 27,901.35	
Frank McKey,	63,849.03	
Fred Hummel,	100,734.87	
Chicago Title & Trust Co.,	44,178.79	$ 236,664.04
National Bank of the Republic:		
Frank McKey,	$262,311.86	
H. G. McKey,	5,908.32	
M. M. Martin,	338,262.46	
Fred Hummel,	85,116.61	
Edwin D. Buell,	412,184.07	$1,103,783.32
197 First National Bank:		
F. M. McKey,	$ 11,702.07	
Fred Hummel,	108,795.22	
Samuel Optner,	29,662.23	
E. H. Johnson,	113,664.50	
Chicago Title & Trust Company,	749,594.61	$1,013,418.63

Northern Trust Company:		
Robert W. McKinley,	$ 51,622.64	$ 51,622.64
Peoples Trust & Savings Bank:		
Frank McKey,	$ 622.18	$ 622.18
Phillips State Bank & Trust Company:		
Sam Howard,	$373,391.19	$ 373,391.49
Harris Trust & Savings Bank:		
Fred Hummel,	$ 15,059.73	$ 15,059.73
Union Bank of Chicago:		
Maurice Klein,	$ 12,448.90	$ 12,448.90
198 Chicago Bank of Commerce:		
Maurice Klein,	$ 2,416.80	$ 2,416.80
South Side Savings Bank & Trust Company:		
Maurice Klein,	$ 37,812.80	$ 37,812.80
Hyde Park-Kenwood Natl. Bank:		
Chicago Title & Trust Co.,	$ 10,604.67	$ 10,604.67
Jackson Park National Bank:		
Maurice Klein,	$ 15,424.28	$ 15,424.64
Total Deposit:		
Central Trust Company,	$ 888,882.87	
National Bank of Republic,	$1,103,783.32	
	$1,992,646.19	

199 To which offer the plaintiffs objected which objection was sustained, and to which ruling of the court the defendants excepted, which exception was allowed.

200 CHARLES M. BATES, called as a witness on behalf of the defendants, being first duly sworn, testified on direct examination by Mr. Heth, as follows:

I live at 65 West Jackson, Union League Club. During the years 1931 to 1933 I was clerk of the United States District Court for the Northern District of Illinois. I recall in general the order entered by Judge Carpenter, requiring receivers to file reports as to the total amounts they had on deposit in various depositories. Subsequent to the entry of that order I received some of these reports from various receivers and trustees.

Objection by the plaintiffs as immaterial and not the best evidence. Objection ocerruled. Exception taken and allowed.

The Witness: Subsequent to the entry of this order of June 11th, 1931, I cannot recall any particular reports received from Mr. Howard or from any particular trustee. I know at times some receivers or trustees would leave reports on the clerk's desk and they would hand them in.

Q. Now, refreshing your recollection on that matter, do you recall at any time having received a report from Sam Howard directed to Joe Muir and talking it over with Miss Foley in your office?

Objection by the plaintiffs as he has already answered the question and it is not limited to a period of time, to the time between August, 1930, and June 21st, 1932.

Mr. Heth: I will get to that if you let me. I have got to ask him first if he recalls anything.

The Court: Yes; go on. Let's see what he says.

A. I have a hazy recollection of one time through inadvertence opening the mail that was on my desk that came to me as clerk, and a letter was opened that was addressed to Mr. Joe Muir as chief deputy clerk of the court and my secretary said, "Here is something, a report from Sam Howard, in the nature of a report. That goes to Judge Carpenter." I says, "Tell Mr. Muir that we opened his letter addressed to him, through an inadvertence, and I regret very sincerely that it was opened by the clerk," and she delivered it to Mr. Muir, that is, Miss Foley, my secretary, turned it over to Mr. Muir. That was some time ago, it is pretty hard to recall the date. If I would guess at it I would say possibly—

Mr. Beebe: Just a minute. I object to any possibility. I don't want him to guess at it.

A. My best recollection of the date is that it was pos-
201 sibly during 1932.

Q. Did you from time to time receive various reports of trustees and receivers?

Objection by plaintiffs as immaterial and not the best evidence. Objection overruled, exception taken and allowed.

A. Yes, I did receive such reports showing the total amount on deposit in the various depositories. I did not have any report in my office or keep any record of the receipt of these reports. Prior to about the first of July 1933 no file was kept in my office by me or anyone under my direction in which these reports that came in were kept.

A. When they came to me I took them forthwith to Judge Carpenter and delivered them personally to him or his secretary, Miss Howard.

Objection by plaintiffs.

A. The instructions I gave to deputies in my office as to what they should do with reports of trustees and receivers were to deliver them immediately—

Objection by plaintiffs as to witnesses instructions.

The Court: He may answer yes or no.

A. My assistant deputies delivered them to Judge Carpenter or, in his absence, to Miss Howard.

A. Yes, I had a conversation with Judge Carpenter about keeping these records.

Objection by plaintiffs as immaterial. Objection sustained, exception taken and allowed.

Q. To your recollection did you at any time retain in your possession any reports of receivers or trustees showing the total amount on deposit?

Objection by plaintiffs as that has already been an-
202 swered and the particular date in 1933 was fixed.

The Court: Objection sustained. The order required the filing. If you want to show the filing or the equivalent, you may.

Mr. Heth: I am trying to find out what he did with them.

The Court: It doesn't make any difference what he did with them. The order directs what should be done. You are pursuing this line of examination for the purpose of establishing the filing of reports by the defendant Howard, claiming that they were lost and cannot be produced.

Mr. Heth: In doing that I am showing the system or lack of system they had of keeping these records.

Witness: Well, it would be hard for me to say whether they were marked filed or not. I assumed my instructions were carried out.

Plaintiffs object to witness' assumption.

A. I did not personally put the file marks on any of these reports that came to me. The reports sometimes came through the U. S. mail addressed to the clerk of the court, sometimes by the trustee or receiver himself, having a little business in court, would stop around to the clerk's office and toss them on the desk and ask the clerk to please see that they got in the proper channel.

A. A number of these reports that were marked filed in

the clerk's office and delivered to Judge Carpenter were addressed to other people than you, were they not?

Objection by plaintiffs as there are too many assumptions in the question. Objection sustained, exception taken and allowed.

Witness: My office at that time was on this floor, part of it in each one of the corridors. I had an office in everyone of the wings around this floor, that is various branches of the clerk's office, and my private office was situated at room 601. Outside of my private office is a smaller office where my secretary sits and the mail directed to the clerk was either
203 opened by my secretary or myself. All of the mail directed to the clerk came into my private office. All mail was supposed to be delivered to the clerk's desk, that is my private desk at room 601 and we distributed it from there. I am now looking at an envelope marked defendant's exhibit 3 for identification, and I cannot say that I have seen this envelope before. Yes, I received an envelope of that nature from Mrs. Rider, who is secretary to Judge Wilkerson. I examined it to the extent that I noted that there were various financial reports from trustees in it, but I did not read the individual reports over. The kind of envelope that was given to me was simply a manila envelope around about this size. I discussed the matter with Judge Wilkerson who had succeeded Judge Carpenter and asked Judge Wilkerson if I was to continue—

Objection by plaintiffs. Objection sustained, exception taken and allowed.

A. I took this folder from Mrs. Rider's office to the clerk's office, had a conference with the chief deputy and the cashier and said to him, "Keep this envelope in the file, in the cashier's file, where it would be—"

Plaintiffs object to his conference and what he did.

A. Such reports as were handed to me by Mrs. Rider I took to the clerk's office, room 650, to be exact, and placed in the vault.

Q. By whom?

A. By Mr. Schierer, my cashier, and myself. That was very shortly after July 1st, 1933. I do not know where Mrs. Rider got the documents or the folder. From the time that I turned the reports over to Miss Howard or Judge Carpenter I never saw any of those reports again until they were turned back to me by Mrs. Rider.

Objections by plaintiffs to the assumption that these

were turned back. Objection sustained, exception taken and allowed.

Q. You never saw any of the receiver's reports until you saw these that were turned over to you by Mrs. Rider?

Mr. Beebe: I object to that. It is an assumption that these were receivers reports that were turned over—

204 The Court: Objection sustained.

Witness: No, I did not turn over to Mr. Schere any other trustees' or receivers' reports except as I have described.

Thereupon the defendants offered to prove by this witness that in the middle of 1931 he had a conversation with Judge Carpenter and that Judge Carpenter told him that he should file all reports of receivers and trustees showing the total amount on deposit with him, Judge Carpenter, and that Judge Carpenter told him that he should instruct all of his subordinates that they bring to him all reports filed in the clerk's office showing the total amount on deposit by the various receivers and trustees.

To which offer the plaintiffs objected as being immaterial, which objection was sustained; to which ruling of the court the defendants took an exception, which was allowed.

On cross-examination by Mr. Beebe, defendants' witness CHARLES M. BATES testified as follows:

A. I am familiar with this order, being defendants' exhibit 2 and it is the only order that was entered with relation to that subject matter during the time I was clerk, that I know about.

205 CLARENCE A. BEUTEL, called as a witness on behalf of the defendants, having been first duly sworn, testified on direct examination by Mr. Heth, as follows:

I live at 6700 South Crandon Avenue. At the present time I am President of the Southeast National Bank of Chicago and have occupied that position since April 6th, 1935. Prior to that time I was special assistant to Mr. James Level, President of the Continental, as manager of the Deposit Liquidation Board, and prior to that time I was Secretary to the

Presidents of the respective Loop banks, as secretary to the National Credit Association, and prior to that time I was President of the Phillips State Bank, and prior to that time I was Vice President of the Central Trust Company of Illinois, and prior to that time I was Vice President and Cashier of the Bank of America. I know the defendant, Sam Howard, and have known him since 1927 or 1928, about a year or two prior to the consolidation of the Central Trust Company and the Bank of America, which was in April, 1929. Just prior to or at the time that I became Vice President of the Central Trust Company I had a conversation with the defendant, Sam Howard, with reference to his making deposits in the Central Trust Company.

Objection by plaintiffs as immaterial. Objection overruled. Exception taken and allowed.

A. This conversation was in Mr. Howard's office. I cannot specifically fix the time except it was during the year preceding the consolidation with the Central Trust Company. I don't believe anyone was present except Mr. Howard and the young lady in his office, that is the young lady sitting here in the court room by Mr. Howard.

Q. All right, now, what did you say to him and what did he say to you?

Mr. Beebe: I object to that as immaterial.

The Court: What is the relevancy of that testimony?

Mr. Heth: To show the relationship between Mr. Beutel and Mr. Howard and to show the circumstances under which Mr. Howard became a depositor in the Central Trust.

The Court: How is that pertinent? It is some considerable time anterior to the transaction we are here to review.

Mr. Heth: I want to prove that they made the arrangement in reference to loans at that time, and at the time he
206 went out to the Phillips Bank that the conversation was that the relationship would be the same.

Objection sustained, exception taken and allowed.

Mr. Heth: I offer to prove by this witness, that at that time Mr. Beutel told Mr. Howard that he would make a—

Mr. Beebe: There is no sense in saying that here.

Mr. Heth: He would make a loan to him for the purpose of financing his estates. Mr. Howard told him of the need of such loans and the purpose for which they would be used.

Objection by plaintiffs. Objection sustained, exception taken and allowed.

Witness: I became President of the Phillip Bank on July

15th, 1930. Within the month prior to going out to the Phillip State Bank I had a conversation with Mr. Howard about the fact that I was going to be President of the bank and about his making deposits in the bank. This conversation was in Mr. Howard's office and if I recollect both Mr. Howard and the young lady were present. I told Mr. Howard that I had been asked by the Central Trust Company to head the Phillip State Bank and Trust Company.

Mr. Beebe: Just a minute. I object to that.

The Court: Go on. It isn't very material.

A. I told Mr. Howard that I had accepted the position of President of the bank and expected to start in there within the next few weeks and that I would like to have him continue his banking business with me, transfer the relationship out to the Phillips, as he gave me the bank account at the Central Trust Company from his former banking connection.

Mr. Beebe: I move that the first part, that he had been asked by the Central Trust Company, be stricken, and that he show some connection in some way.

Mr. Heth: That is what he stated to Howard.

Mr. Beebe: Well, I object to it.

The Court: It may stand. I don't think it makes any difference.

Mr. Beebe: I don't think it does myself.

207 A. Mr. Howard refreshed my memory on the facts in connection with that bank account. He would have to have the same accommodations that he was getting over at the Central Trust Company that I had arranged for in the matter of extending him loans that would provide for the working capital of some of these receiverships, and asked quite directly whether or not we were going to be large enough to take care of those advances.

On motion of the plaintiffs "quite directly enough" was stricken from the answer.

Q. What conversation did you have with him at that time with reference to the making of loans at the Phillips Bank?

A. I told him there would not be any question about him being taken care of on the same basis as he was over at the bank, that I was well acquainted with his needs, and in the Phillips picture I would have more of a direct supervision on that relationship than I had at the Central Trust Company. That was all that was discussed at that time. I was just going to say it was a matter of convenience that brought up the question as to how he was going to go out to 7001 North

Clark Street to make those deposits, and I told him that we had a messenger downtown every day and that we would pick up his deposits at his office and it would not require anyone going out to the bank. We also went into why I was making the change. He asked why I was making the change and I told him that the Central Trust Company was in control of a substantial block of that stock, that they were interested in the future of that bank.

Mr. Beebe: I object to that.

The Court: Let it stand. It is a part of the story.

A. I told Mr. Howard that they had recently removed all objectionable items from the bank's investment portfolio. and that it looked to me like a stepping stone into a better position. I do not recall anything else that was said more than Mr. Howard said he would give the matter some thought and see what he could do about it, incidentally indicating at that time, or asking at that time, whether we were a depository in connection with the United States Bankruptcy Court. I told him I didn't know but I would look into the matter and if we were not I would make an application to be appointed. Shortly after going out to the bank I called on Mr. Howard again and asked him if he had given the matter some thought, that from the information I got from our attorneys we were qualified as a depository under this bankruptcy procedure,
208 and that I would like to have him give some more thought to the relationship. This was within two or three weeks after the bank opened, sometime between July 15th and the 1st and 10th of August. Through the middle of August, one Saturday afternoon, Mr. Howard dropped in the Phillips State Bank and paid us a visit. I was President at that time and I again asked for his business. He said that he had made up his mind to transfer a substantial part of his account and of course I was pleased. I took him over to the Devon Trust and Savings Bank and introduced him to the Chairman of our Board, B. L. Rosset, who was President of the Devon Bank. Mr. Rosset confirmed my statement and said that he was agreeable to go along on the credit relationship such as I had discussed with him in the matter of taking over some of the loans, which was in line with a loan I believe that I made prior to that in anticipation of this account. We told Mr. Howard that we would take care of him in the Phillips State Bank on extending him these loans that were needed in connection with this receivership business, that we were

both acquainted with loans of that type and we were glad to make them.

The Court: Just a minute. You say you were acquainted with loans of that type. What do you mean? Loans to a trustee or receiver personally? What do you mean by that?

A. A number of the receivers operated in that capacity, more so in the state courts—

Mr. Beebe: Judge, I think I will have to object to that. I don't think the question of custom has anything to do here.

The Court: That doesn't explain it.

Mr. Moses: It has a lot to do with it, your Honor.

Mr. Beebe: I don't think there is any possible question of custom.

The Court: A widespread habit of banks lending money to receivers and trustees personally? I hope that isn't so.

Mr. Beebe: I don't think that question, Judge, is a question that is of any materiality as to the correctness or righteousness of the particular thing that is happening in this case.

The Court: It may make it worse.

Mr. Beebe: That is another story.

Mr. Moses: We are going to offer the evidence and if it makes it worse, if your Honor please, we will have to stand the burden of making it worse.

Mr. Heth: We are raising no objection to the court's question.

Mr. Beebe: I am.

The Court: What?

Mr. Beebe: He says he is not raising an objection to the court's question. I say I am.

The Court: I am asking the witness what he means by the matter of lending money to a receiver or trustee personally.

Mr. Beebe: I understand that he meant that that had been done before to this man. He was familiar with the situation with this man. That is what I understand.

Mr. Moses: We are willing to have that question answered, if your Honor please.

The Court: Will you answer the question?

A. Is this in general, your Honor, or is it in this particular case?

209 The Court: In general or in particular, I don't care how you answer it.

A. Yes, loans are made to individual receivers who are operating a group of receiverships in which it takes an independent fund to operate these receiverships and a loan is

made in anticipation of the fees that are accruing in those respective cases.

Mr. Beebe: I object to that and move that it be stricken.

The Court: Well, it is just an intolerable sort of thing. Nobody could give any sanction to that sort of thing.

Mr. Moses: May we, if your Honor please, preserve an exception to your Honor's statement in respect to that matter?

The Court: Yes, sure. The idea of a bank—

Q. You knew, Mr. Beutel, that those loans were being made to receivers, is that right? Objection by the plaintiffs.

Objection sustained. Exception by the defendants taken and allowed.

The Witness: The conversation I had there with Rosset and Howard with reference to the making of loans for the purpose of making loans, I do not remember whether Mr. Rosset brought it up or I brought it up, was that we were glad to take over any loans that he had at the Central Trust Company that were made for the purpose of assisting him to operate these receiverships and that we would cooperate with him in connection with future loans of that type to be made by the Phillips State Bank. At that time Mr. Howard did not say anything about why he wanted the loans from the Phillips State Bank or what he would want them for because I had taken up with Mr. Rosset before I had taken the commitment from Mr. Howard and explained to Mr. Rosset that it was the practice over there at the bank and we had had a very satisfactory experience with loans of that kind and that the moral risk of the individual was the important factor.

Mr. Beebe: Was that a statement that was made in the conversation with Mr. Howard?

A. That was a statement that I made to Mr. Rosset at the time that the loans were approved by the loan committee of the Phillips Bank.

Mr. Beebe: When Mr. Howard was there?

A. No, Mr. Howard was no party to that.

Mr. Beebe: I better move to strike that.

The Court: Do you mean that this is what the officers of the bank did in connection with the granting of these loans to Mr. Howard?

Mr. Beebe: What they talked about with each other I don't think is material.

The Court: It may stand.

Q. At the time that you had the conversation with Mr. Rosset and Mr. Howard that you referred to, had you made any loan to Mr. Howard?

A. I think we made a small loan at the bank pending the final approval of our depository bond. At the time that loan was made I had a conversation with Mr. Howard as to the purpose of the loan. He was going into the Central Trust Company to borrow that money, as he did in another case or two there, and I told him to borrow it from us, that I
210 wanted his business out there and I would rather have him get started with us than to cement that relationship over at the other place. An application for the loan was made and his personal financial statement was filed with us. The loan was then approved by our Board of Directors.

The Court: Just how did you bankers reason among yourselves on that? Did you say, let us make an unsecured loan for this amount because he is going to bring us a lot of trust funds? Was that the main reason among yourselves?

A. His personal financial statement would show on his assets accrued fees just like a manufacturing firm would show accounts receivable.

The Court: Well, then you were banking upon what you thought for sort of a pledge of his unearned fees in trust estates?

A. Well, it wasn't a pledge. We never took an assignment. It was anticipation.

The Court: No, but you trusted him, did you, because of the unearned fees that he might get in a trust estate?

A. No. That helped that statement a lot. That was the liquid part of the statement. He had other assets in the statement of value, real estate, but in analyzing his statement as to where we were getting the money from, it was the liquid part of that statement.

The Court: You thought, did you, that if he brought the trust funds there that his unearned fees would be somewhere in those trust funds and that you would lend him money on the strength of that? Is that the way you figured it?

A. I don't know what particular accounts they came from.

The Court: Well, all of them together, as many as he could bring?

A. Not that he would bring to us, but all that he had in all of his banks.

The Court: That is what I mean, exactly.

A. Yes.

The Witness: That loan, like all other loans that Howard made at our bank was referred to our Board of Directors and our Loan Committee for approval. Subsequently I went into

court and got an order designating the Phillips Bank as a depository. I am sure that the minute I was informed that the bank had been designated I called Mr. Howard and told him and subsequent to the designation he started making deposits at the Phillips State Bank and Trust Company and started to give us some of the accounts he had at the Central Trust Company. I don't remember how many loans Mr. Howard obtained from the bank after the first loan but if I recall correctly all of the loans were approximately $15,000.00 or $18,000.00 in the aggregate. The application for the loan was not made on a formal form. It was a request and the request was transferred verbally by the bank officer to the directors and the directors approved the loan. There is no formal written application in the form of a note account or loan as Mr. Howard was making. The loans bore the current rate of interest. I recall the failure of the Builders and
211 Merchants Bank in April, 1931. Subsequent to the failure of this bank I called Mr. Howard and told him that we were experiencing a lot of activity out there as a result of these banks and that if any information came to him that might disturb him that he should ease his mind, that not only had I direct assurance that our bank was perfectly safe and sound, but also there was a public demonstration made in connection with our bank and also the Devon Trust and Savings Bank, which was, by virtue of our Mr. Rosset being President over there, interlocked as far as the committee was concerned. That first conversation was on the telephone and within a week I had subsequent conversation with him in his office earlier in the evening. At that telephone conversation I had that day when I tried to alleviate any apprehension among any of my larger depositors, I told Mr. Howard that I would see him in the next day or two when this surge was over and Rosset and myself called on Mr. Howard at his office within the week after that, and we went out to dinner together at some restaurant out here at 63rd or 67th Street. We went through the whole banking picture with Mr. Howard. Mr. Howard asked me how the bank was coming along, what the run had done to us and what happened and what the story was, and I told him that we had met demands of about a million dollars in withdrawals out there and that the Central Trust Company had not only given us a million dollars without the direct pledge of any assets, but also told us that they would take our assets dollar for dollar; that that was further substantiated by the action of the various officers, both senior

and junior officers of the Central Trust Company, and public statements that they made from platforms at the Devon Trust and Savings Bank, in which one particularly Vice President, Mr. Bullard, standing on a platform with this mass of people at the Devon Trust and Savings Bank and holding in his hand a financial statement of the Central Trust Company of Illinois, and right ahead of him was Eugene Thayer who was Chairman of the Executive Committee of the Central Trust Company of Illinois and Chairman of my Advisory Committee at the Phillips State Bank, and chairman of the Advisory Committee at the Devon Bank, and Bullard in front of him said, that the Central Trust Company, with $180,000,000.00 in resources is behind the Phillips Bank and the Devon Bank, and that was the meat of the cocoanut.

212 Q. That is what you told Howard?

A. That is what Mr. Howard got, like other large depositors, yes, that is what I told Mr. Howard.

Q. At this meeting?

A. Yes. This was in April, 1931. That was the high spot of that conversation because the meeting was the result of that run. I don't recall anything else that was said.

Q. Refreshing your memory, do you recall whether you said anything to him at all about what the officers of the Central Trust Company did after the closing of the Devon Trust and Savings Bank on the day of the run on that bank in April, 1931? That is with respect to coming over to your bank?

A. Well, it was not after they were at the Devon Trust. There was a Division Street between the two banks. I told Howard that the officers of the Central Trust Company on their way out to the Phillip Bank, which was their bank, had stopped—

Mr. Beebe: I object to the statement "which was their bank" unless he said that to Howard.

A. I told Howard that officers of the Central Trust Company on their way out to the Phillip State Bank, which was their bank, had stopped at the Devon Trust as a matter of curiosity; that the Devon Bank had no loans in the Central Trust Company, there was no stock ownership in the Central Trust Company as far as the Devon bank was concerned; but the Rosset connection through the advisory committee which had the joint advisory Committee influenced that stop, and the larger strength stopped down there because our play was not in mass formations as it was at Devon, so that part of the officers came up to our bank, but we did not have the step-

ladder oratory that the Devon had, all that the Central
213 Trust Company boys did was to distribute among these customers on the floor these Central Trust Company statements, assuring these customers that they need have no fear, no worry, that the bank was supported by the Central Trust Company. Yes, I told all of this to Howard. From time to time after that conversation with Mr. Howard I used to see Mr. Howard quite frequently, at least once every two or three weeks. I was either in his office or he was out at the bank on a Saturday afternoon to see me and during these conversations that I had with him the question of the stability or the security of the Phillip State Bank and Trust Company was discussed from time to time subsequent to our April run of 1931. When we met of course the progress of the bank after the run was discussed with Mr. Howard, but the incident that really created his further inquiry was caused by the failure of another neighborhood bank near us, namely the Sheridan Trust that failed in June 1931. I called Mr. Howard on the phone and told him that so far as the failure of the Sheridan Trust Company was concerned, which was a result of the Foreman National Bank, it had started to create some against outlying banks; that there was no change in our position at all; that we were not alarmed, regardless of what would happen in there, because we had continued assurances of sufficient help to carry us through from the Central Trust Company.

Thereupon a document was marked Defendant's Exhibit 5 for identification and was passed to the witness.

The Witness: Yes, I had a conversation with Mr. Howard with reference to this document marked Defendant's Exhibit
214 5 for identification. I received the original of this letter, being Defendants' Exhibit No. 5 for identification, and I told Mr. Howard that we had received this letter from the Central Trust Company, which was in line with the conversations that I had had with him right along. I had a talk with Mr. Howard about a conversation that I had with Mr. Clark of the Central Trust Company in the early part of June, 1931, in reference to supporting the Phillip State Bank.

Mr. Beebe: I object to that as immaterial. You said there was a conversation.

The Court: The question properly calls for a conversation between this witness and Mr. Howard, and the question as to whether the witness had previously had a conversation with some Central Trust man at the Central Bank is not material.

Q. Did you have any talk with Mr. Howard in reference to the defendants' exhibit No. 5 for identification.

215 A. Yes.

Q. Prior to the time that you talked with Mr. Howard about this defendant's exhibit 5 did you have a conversation with Mr. Phillip Clark?

Objection by plaintiffs as immaterial. Objection sustained.

Mr. Moses: Can't we show there was a conversation without attempting to show what the conversation was, because it was followed by a conversation with Mr. Howard which we will prove.

The Court: All right, you can prove it.

Mr. Moses: In which this witness would testify what Mr. Clark said to him and what he said to Mr. Clark.

The Court: All right. The question properly calls for the conversations. He wants to tell part of the conversation with Mr. Howard, but he says then he said to Mr. Clark and Mr. Clark said to him, something, that is another matter.

Mr. Moses: All we want to prove is that there was a conversation between him and Mr. Clark.

The Court: He says that he told Mr. Clark or Howard; the discussion with respect to Mr. Clark may be a cross examining question, I do not know.

Mr. Moses: May we take an exception to the remarks of the court on that subject?

The Court: Yes.

Q. Now, Mr. Beutel, will you state what conversation you had with Mr. Howard about defendants' exhibit No. 5 for identification which purports to be a letter from Mr. Clark?

216 A. I told him that we had received this letter from Mr. Clark and that Mr. Rosset had just left Mr. Clark. He called me on the telephone and sent that letter out by messenger. He had called me on the telephone and said he had received that letter from Mr. Clark and that the letter in itself did not imply the strength that Mr. Clark assured Mr. Rosset that he had, that Mr. Clark told Mr. Rosset that he would take our assets dollar for dollar to pull us through that run. Mr. Clark, Mr. Phillip R. Clark, was President of the Central Trust Company of Illinois. I gave Mr. Howard a copy of that letter and told him that we had received this letter with full permission to send it to our customers and for publishing it in the bank. We had a photostat blow-up

of it made. Well, by "blow-up" I mean an enlargement of the photostatic process and we put it on an easel in the bank lobby and photostated the letter and mailed it to our largest depositors. I told Mr. Howard that we had gotten permission from Mr. Clark to use the letter.

Q. Now, do you recall any other conversation that you had with Mr. Howard in June, 1931; that is about the condition of the Phillip bank or about the security of his deposits?

A. I told Mr. Howard that Judge Carpenter had called me in connection with our bond and wanted to know what our bond was, or discussed the amount of our bond, and mentioned the fact that Mr. Howard was carrying a very substantial amount out there with us and he thought the bond was too small and that I told Judge Carpenter that I wished that he had asked for that bond about ninety days before when the bond companies were still writing bonds 217 but instead of writing them now or at that time, they were cancelling them, and that I would get in touch with Mr. Thayer who was the representative of the Massachusetts Bonding Company. I also told Mr. Howard that I told Judge Carpenter in this conversation to call Mr. Clark at the Central Trust Company regarding our situation, and that—well, he apparently was not going to talk to Mr. Clark. He had indicated he knew General Dawes and he was going to call General Dawes instead. After I told Mr. Howard all of this, I think it was at that conversation, he told me that he had received a similar call from Judge Carpenter regarding the same matter or something like that. After the conversation I had with Mr. Howard about my conversation with Judge Carpenter over the phone I don't recall when the next conversation was unless it was the following Fall when the Rogers National Bank failed. This bank was across the street from us. I don't recall whether this conversation was in our office or in the bank or whether it was a telephone call. The occasion for the conversation was the failure of the Rogers Park bank. Mr. Howard asked us how we were going and what all of the trouble was, and there followed the general conversation that follows whenever there is any bank run, as to whether he needed to be concerned about the bank, whether there was any change in our status that would cause him to have any concern. I told him there was not, that our situation was improving if anything, out there, and there was no change in the relationship with our correspondents.

Q. Now what, if anything, did you say to him at that time about the Central Trust Company?

A. Just what particular time it was or what after-
218 noon it may have been, but somewhere in the following situation, I think that was the time that I told him about the more definite interest that the Central Trust Company had taken in the picture. I told him that the form of ownership which had been reflected, which had been represented through this loan of Mr. Rosset had taken on a move of a different ownership, whereas the interest on his loan had been cancelled; that Mr. Rosset when he tried or when he told the Central Trust Company that he was selling the bank to Woodruff or the National Bank of the Republic Mr. Thayer would not permit him to do it and Mr. Thayer made him a definite price for the stock, and that there was in formation an outlying-bank holding unit in which Mr. Thayer was playing an important part. Mr. Thayer was chairman of the executive committee of the Central Trust Company and chairman of our advisory committee at the Phillip Bank. I told Mr. Howard that on the basis of that situation alone I had no concern about the bank, because at that particular time I was not active at the bank any more because I had taken up the post as secretary for the National Credit Association, which was the bankers' pool to make loans to the outlying banks that were experiencing these runs, and assurance of support ought to eliminate any close application to the policies as it had been prior to that in my time. I told Mr. Howard there wasn't any need for his concern about the security of his funds because of these supporting circumstances that I just explained, that the evidences of support that we had received from the bank—

Mr. Beebe: Is that what you told Mr. Howard?

A. Yes, sir, I told Mr. Howard that as far as the
219 bank was concerned, it was clean, that as far as pure assets was concerned, that when I went into the bank Mr. Rosset through the help of the Central Trust Company had taken out all of the poorer assets; that he had nothing but slow assets to work out after a certain percentage, and that the bank had been examined by the clearing house and incidentally loans of Mr. Howard's type were approved by the Chicago Clearing House Association, and I had told Mr. Howard that this bank had been designated as one of the "A" banks of Chicago in connection with the outlying-bank stabilization picture, by the representatives of the Loop

banks. By this bank I mean the Phillip State bank. I used to see Mr. Howard downtown frequently after this conversation. My office was just across the street from his in the Federal Reserve Bank Building and occasionally Sam and I would have lunch together. I don't remember any specific time, but every time we got together it was natural for him to ask me about the Phillip bank, but in the conversation with him which was the the result of my particular work at that time—it involved the general banking situation, involved the constructive measures that were being put forth by the National Credit and later the R.F.C., to bring this outlying-bank picture into a stable position. I told Mr. Howard all of this conversation. I told Mr. Howard as late as April, 1932, and I am trying to think, trying to substantiate a
220 conversation I had with him whether or not I showed him the definite schedule of program on the merging of the outlying banks as was being formulated—

Mr. Beebe: Just a minute, I object to any question of formulation or anything of that kind. If he showed him something and he has it here, it will be all right.

Objection sustained.

Mr. Heth: I am asking you what you told Mr. Howard in any conversation voluntary or as a result of questions by Mr. Howard. That is all I am asking for. Now if any of those facts you are relating you told Mr. Howard, please tell what you told him and when.

Mr. Beebe: I object to the designation by the attorney to the statement as facts.

The Court: The question I think calls for conversations and he is succeeding in his questions in getting them. They are not answered by you saying you are trying to think when you told him something.

The Witness: I am under oath here and when I speak of substantiating a conversation I want to be fair. I did tell Mr. Howard everything that was going on in that institution because he was the largest—

The Court: Just a minute. If you did, why, tell us what you told him. I think that is what Mr. Heth's question calls for.

221 A. I told Mr. Howard that as far as the Phillip bank was concerned, I had no concern about it, that the Phillip bank had been designated as the far north side "A" bank which was to absorb two other banks in this stabilization program; that the loop banks in collaboration with the

R.F.C. were completing—I told Mr. Howard it was classified as a class "A" bank by the Chicago Clearing House Association, by the Representatives of Loop Banks who had been designated to work out this problem, the confirmation of the deal was shortly to take effect in connection with the R.F.C. officials. Yes, I told Mr. Howard this.

Mr. Heth: Now do you recall any conversation with Mr. Howard at any time about the support of the Central Trust Company during the time of runs on the bank?

The Court: He answered that.

Mr. Beebe: If he did, when and where?

The Court: I wouldn't have interjected except, did he have any talk at that time.

Mr. Heth: To refresh your memory, do you recall telling Mr. Howard anything about the amount of moneys the Central Trust Company had advanced during the period of the runs?

Objection by plaintiffs unless the time is fixed when conversation took place.

Q. When was it do you remember?

222 A. Each time we had a bank run the conversation was on as to what had happened, how much money went out to the bank, how much money we needed to carry us through and how much the Central Trust Company had poured into the picture that day. Going back to the first run that occurred in April 1931 I told Mr. Howard at that time that the Central Trust Company had advanced moneys to the Phillip Bank to take care of the runs, that we had gotten almost to approximately 1 million dollars from the Central Trust Company to take care of that run. Subsequently at the time of that June run, I told Mr. Howard that we had repaid this money. I told Mr. Howard at the time of the June run when I was discussing the aftermath of the Sheridan Trust failure that we had gotten about three million dollars of the Central and that the million we had gotten from them in April had been repaid before this run hit us. I don't remember whether I told him anything about the amount of money that had been obtained by the Phillip bank in the June run 1931 or not. Yes, I remember telling him about the amount of money the Phillip bank had received from the Central Trust Company to take care of subsequent runs after June. That question came up when the Rogers Park bank closed. We needed about half a million dollars. In October, about September or October, 1931. In the con-

versation telling him about the run I told Mr. Howard about this half million dollars coming out from the Central Trust Company. I don't remember whether I told him subsequently about the return of that money to the Central Trust Company because I did not return it. I don't remember that I ever talked to him or that I eyer said anything to him about that. As to the next run I think there was a little run
223 after Christmas, the latter part of 1931 and the beginning of 1932. I told Mr. Howard the circumstances of that run, that I had been down East on the National Credit work and had been receiving reports from the bank and every day our deposits were going up and our cash position was improving and that I got back on a Sunday morning and I found that the neighborhood was ablaze, that through a rumor in the church across from the bank, there was word that we were not going to open the following morning, we had one of those under-cover runs for about a week, costing us half a million dollars, and that that particular run had more fire to it because the rumor seemed to go downtown, and that was the one that Mr. Howard called me on and wondered what the trouble was out there at the bank, because outwardly there was no run in the bank at all. I told Mr. Howard there was nothing to be concerned about, that the bank was in better shape at that time than it had been for months; that our deposits were coming back; that we were the only bank out there; that we were getting the benefit of all the business. Subsequent to this time the next run on the bank was the one that occurred the day before the bank failed. I recall that on June 18, 1932, there was a run on the Devon Trust and Savings Bank and the bank closed and on the same day there was a run on the Phillip State Bank and the bank remained open all day and until nine or ten o'clock in the evening. The Devon bank closed at noon on Saturday. The relationship of the Devon and Phillip made it almost one institution, and on Monday morning although we felt certain the backbone of this run was broken Saturday night, on Monday morning they started piling in again. At the same time the Reliance bank closed. I called up Mr. Traylor of The First.

224 Mr. Beebe: I object to that.

Mr. Heth: I am now proving the circumstances under which the bank failed, the condition of the bank right up to the last moment.

Objection sustained. Exception by the Defendants taken and allowed. Thereupon the Defendants offered to prove by this witness at this time the circumstances under which the Central Trust Company on the 20th day of June, 1932, refused to make further advances to the Phillip State Bank, to which offer the Plaintiffs objected, which objection the Court sustained. to which ruling the Defendants excepted and which exception is allowed. Thereupon the Defendants offered to prove by this witness that at this time Mr. Beutel talked with the President of the Central Trust Company and was told by the Central Trust Company that they would lend all the money they needed. Objection as immaterial. And offered to prove further that no information of the condition of the Phillip bank on June 18, 19, 20th was given to Mr. Howard. Objections sustained and exception taken and allowed.

The Court: You can ask the witness, if you desire, whether he communicated any of the circumstances he has related regarding these runs on the 18th, 20th and 21st to Mr. Howard.

Witness: The runs that were made on the Phillip bank on June 18th, 1932, were not communicated by me to Mr. Howard on that day. The runs that were made on the Phillip bank on June 20th, 1932, were not communicated by me to Mr. Howard directly on that day. I called his office. I don't remember whether it was Monday that I talked to Mr. Howard. The bank closed at about a quarter of ten on the 21st. I was down at the Central Trust.

225 On motion of the Plaintiffs, statement of witness as to where he was, was stricken. Thereupon the Defendants offered to prove by this witness at this time that the cause of the failure of the Phillip bank, the closing of the Phillip bank, was the repudiation of the promise of the Central Trust Company to advance money at all times to keep this bank open, to which offer the Plaintiffs objected because there is no proof of any such promise and there is no branch banking in Illinois and there was no duty on the part of the Central Trust Company and because all of this is immaterial. Objection sustained. Exception taken and allowed. Thereupon the Defendants offered to prove by this witness that witness on the 20th day of June, 1932, had a conversation with Mr. Clark, the President of the Central Trust Company, at which time Mr. Clark told witness that he would advance all the money that was necessary to take care of any runs on the bank, to which offer the Plaintiffs objected as being

immaterial. Objection sustained and exception taken and allowed. Thereupon Court was adjourned until Wednesday, September 18, 1935, at nine-thirty o'clock A. M.

Wednesday, September 18, 1935.

(Court met at 9:30 o'clock A. M. pursuant to adjournment, present and presiding the Hon. Ferdinand A. Geiger, United States District Judge sitting by designation in this Dis-
226 trict in this case. Came again the parties and the jury heretofore impanelled in this case and the following proceedings were had, to-wit: Apperances, same as before.)

The Defendants offered in evidence Defendants' Exhibit number 5 for identification, being the letter of the Central Trust Company signed by Mr. Clark with reference to lending support to the Phillip State Bank that was given by Mr. Beutel to Mr. Howard. The Plaintiffs objected to said offer because the letter does not indicate any duty on the part of the Central Trust Company in any manner. Objections overruled and exceptions taken and allowed.

Thereupon DEFENDANTS' EXHIBIT NUMBER 5 for identification, so offered, was received in evidence and marked DEFENDANTS' EXHIBIT NUMBER 5 and is in words and figures as follows, to-wit:

227 DEFENDANTS' EXHIBIT 5.

(Letterhead of Central Trust Company of Illinois.)

June 12, 1931.

C. A. Beutel, Esq., President,
Phillip State Bank & Trust Company,
7001 North Clark Street,
Chicago.

Dear Mr. Beutel:

We are cooperating with the loop banks in sending millions of dollars to the outlying banks, and are prepared to lend them further support consistent with sound banking practice.

Fortunately, the public seems to realize that many of these banks are able to take care of their own needs, and are in sound condition. In this emergency we are glad to lend our support if needed to the Phillip State Bank and Trust Company.

Cordially yours,

PHILIP R. CLARKE,
President.

PRC-P

228 Thereupon Counsel for Defendants read to the Jury Defendants' Exhibit 5.

CLARENCE A. BEUTEL, a witness on behalf of the Defendants resumed the stand for further cross examination by Mr. Beebe and testified as follows:

During the period between August, 1930, and June 21, 1932, Sam Howard as Trustee and Receiver under various estates was the largest depositor in my bank.

A. Yes, I know as a banker that a National bank cannot own the capital stock of a State bank and that a State bank cannot own the capital stock of another State bank.

Objection by the Defendants, overruled and exception taken and allowed.

A. The various loans that were made by the Central Republic at the time of these various runs were eventually collateralized.

A. No, all of the loans that were made by the Central Republic have not yet been paid.

Objection by the Defendants, overruled, exception taken and allowed.

Q. What banks were known in Chicago as the Rosset chain?

Objection by th Defendants overruled, exception taken and allowed.

A. The Devon Trust and Savings Bank, the Ogden National Bank and the Phillip State Bank. The Ogden National Bank failed about a year prior to the failure of the Phillip State Bank. It was not operated as closely to the Phillip State Bank as the Devon Bank. It was, however, one of the three banks under general ownership, that is Mr. Rosset had a heavy interest in the three. I would imagine that the financial people knew the set-up of these banks. I do not know whether it was widely known in Chicago that Mr. Rosset had such an interest in these three banks. It is pretty hard to say
229 whether in financial circles and those dealing with finances in Chicago the Ogden bank was widely known as one of the three of the Rosset chain because after the Ogden Bank closed we did not have a ripple up North at all.

On motion of the plaintiff's witness' statement above having a ripple up North was stricken.

The Defendants objected to all of this testimony by the wit-

ness, which objections were overruled and the Defendants took an exception which was allowed.

Witness: The Ogden National bank was never tied up with the Phillip or the Devon as far as any sponsorship was concerned, the Ogden National Bank did not have the advisory committee that the Devon or the Phillip had.

Same objection by the Defendants. Overruled. Exception taken and allowed.

Witness: I think it was after I went up to the Phillip bank that the Ogden bank failed, I think about September 28, 1931. I think it was earlier than that that the Rogers Park National bank failed, it might have been six or eight months before.

Q. There was a report made each day to the officers of your bank, was there not, of the condition of the Phillip Trust and Savings Bank?

Objection by the Defendants. Objection overruled and exception taken and allowed.

A. Yes, we have a general balance; the general ledger shows that.

Q. Calling your attention to the condition just before the Phillip State Bank closed, do you recall whether you had any discussion with any person claiming to represent Mr. Howard, in an effort to transfer his funds from ordinary commercial deposits to trust deposits?

Objected to by the Defendants. Objection overruled. Exception taken and allowed.

A. Yes, that discussion was held with both the young lady in Mr. Howard's office and Mr. Pennish, the attorney for
230 Mr. Howard. It was sometime Saturday afternoon after the Devon bank failed.

Q. Will you relate that conversation?

Objection by the Defendants because no evidence there was any authority by anyone to talk for Mr. Howard.

Objection overruled. Exception taken and allowed.

231 A. Mr. Pennish, by virtue of an acquaintanceship with Rosset, knew Rosset's connection with the Phillip bank, and when he heard, apparently, that the Devon bank had closed, he immediately called—apparently called me immediately, and asked me what the situation was, and went into the relationship of Mr. Howard's account. Mr. Howard was away and he could not get in touch with him, and in the course of the conversation brought out the statement that he was under the—had been under impression all the time that these ac-

counts were in the trust department, all through the relationship, and I told him no, that they had not been, that it had not been the custom of the bank to carry that type of account in the trust department, but if he insisted we transfer them there, if he felt more comfortable I would see that the transfer was made and on Monday my conversation was of the same character with this young lady from his office. I am not certain whether I saw Mr. Howard Monday afternoon or Tuesday. At the time of the June run on the Devon bank when speeches were made I did not go down with these men and none of the officers of our bank went with them The National Credit Association was the forerunner of the R. F. C. It was a loaning agency formulated on a similar basis, but it was formed in anticipation of the R. F. C. being legislated. I started with that corporation about October 1931 and continued with it until about August 1933. Yes, I recall that that organization on or about February 1, 1932, made a loan of approximately a quarter of a million dollars to the Phillip State Bank. The runs were shortly after Christmas and prior to that and the loan was developed right about that time.

232 The bank's loans are shown as bills payable on the bank statement but the assets pledged are not set up in the financial statement.

Q. Now here is a statement of the bank and you will see commencing about March 31st certain bills payable. Notice the amounts as you go along. You come to the end of December 31, 1931, and there are no bills payable. Then again in January you will find no bills payable shown on the bank records on December 31, 1931.

Objection by the Defendants as no evidence any of the information contained in the statement referred to was brought to the attention of Howard and because it is not proper cross examination as it has never been touched upon and because it is immaterial and because no evidence that Howard knew anything about the condition of the bank at the time the statement was made up.

Objection overruled. Exception taken and allowed.

The Court: This is cross examination. It might be pertinent to inquire of the witness if it be the fact that these were not communicated to Howard, why they were not communicated, and why Howard did not ask.

Objection by the Defendants to the Court's statement.

The Court: Yes. I want to say to you coming in as you have with an exception that I made the statement for the pur-

pose of indicating my conception of the range of cross examination.

A. There were not any bills payable.

Q. I notice a material increase at the end of December in the amount of deposits and a material decrease in the amount of deposits both in November and January, as compared
233 with December. Does that have any relation to the failure to find any bills payable at the end of December?

A. I cannot tell that unless I see the daily statement of the bank about that time.

Q. I am not trying to go into the banking situation. I am trying to find why there are no bills payable at that time; that is the one question I am after. It is not a question of going into the method of operating the bank or anything of that kind. You will observe there that it is on the 30th but not on the 31st, and is there again on January 2. I am trying to find why it was not there on December 31st.

A. I see here a cashier's check of—here is an increase right in here and the official checks.

Mr. Beebe: That is where it may be.

A. That is where it may be. Where did that money go? Is this loan—is this a loan of the National Credit?

Mr. Beebe: I have not the slightest idea. I am just giving these statements and asking for information.

A. Well, that loan was paid off apparently at the Central Trust Company at that time and transferred over to the National Credit Association.

Mr. Beebe: Apparently there is another one here of January 2.

A. well, that is what I say, that I think that is the time the loan was cancelled from the Central Trust Company into the National Credit. I think that was in February or March. You have called my attention to Plaintiff's Exhibit number 17. That is a public statement as of December 31st. There is no separate listing on here for the cashier's checks, cer-
234 tificates of deposits, so that the deposits there were increased by that amount.

On redirect examination by Mr. Heth Defendant's witness CLARENCE A. BEUTEL testified as follows:

If the bank had borrowed money and had pledged some of its assets as security for the loan there would be nothing on

the bank statement to indicate that the bank had pledged its assets and anyone who read that statement wuold not know that the bank had pledged any of its assets for a loan.

ARTHUR E. CLAUSSEN, called as a witness on behalf of the Defendants having been first duly sworn testified on direct examination by Mr. Heth as follows:

I live at 2124 Cleveland Avenue, Chicago. I am a deputy clerk of the United States District Court for this District and have been such latter since about February 10, 1931, and previously to that from about January 1, 1901, to the time of the consolidation of the Circuit and District Court and for the District Court to September 1, 1930. During the early part of the Summer of this year, 1935, I had a conversation with Mr. Moses in which he asked me to make a search of the clerk's office to find out whether I could discover or find any reports of receivers and trustees showing the total amount they had on deposit in various depositories and I made such a search in so far as the record in the office permitted me to. I searched in the vault and generally around in places where extraordinary things, of which this was one, might be accumulated. I knew at the time I made the search that there was no regular place in the clerk's office where these reports were kept so I just started looking around every place where I thought
235 such reports might be. Intermittently the search continued until I left on my vacation on the 24th of August of this year. I found a book which had been somewhat in the possession of Mr. Muir up to the time he left the office and paging it one evening, not for the purpose of looking or expecting to find anything in it, I did find a carbon copy, presumably a letter, dated January 9, 1931, addressed to Mr. Muir as Chief Deputy Clerk of the Office, which, of course, he was not at that time, he having resigned earlier in the year. That was the only document that I found of Sam Howard's or of any receiver showing the amounts that had been deposited by them in the various depositaries. I have not even made a further—the book that I have seems to be an accumulation of letters of instruction, circulars as we call them, from the Department of Justice, over the signature of one or another of the attorneys general or their assistants in the time gone by. It dates back originally to May 26, 1931, that being the first document here. This book would probably be the last place

I would look for a receiver's report or anything like that. The report is not loose in there. I left it just where it was. I failed to bring with me the key to the book and I will unlock it and take it out later on.

Thereupon the report appearing in said book was marked as Defendant's Exhibit 6 for identification.

Witness: I do not know the signature of Sam Howard and cannot say that this is his signature on the report. Yes, I will keep the book here in the courtroom. The document marked Defendants' Exhibit 6 for identification is the document which is in the book that I have just referred to and is the document that I found in that book.

236 No cross examination.

FERDINAND SCHERER, called as a witness on behalf of the Defendants, being first duly sworn, testified on direct examination by Mr. Heth as follows:

I live at 6536 Oshkosh Avenue, Chicago, and am cashier to the United States District Court Clerk's Office and have been for eleven years. Thereupon the manila envelope being the envelope identified by Plaintiff's witness Mr. Freeman and produced by him while he was testifying was marked Defendants' Exhibit number 3 for identification, which Defendants' Exhibit number 3 is a manila envelope about 10 by 15 inches in size in the upper left-hand corner of which appears the following printed matter: "Reports of receivers of funds in their hands and banks where they are deposited." It is stipulated and agreed that in lieu of making said envelope a part of this bill of exceptions that the foregoing identification may be treated sufficient for this purpose. You have handed me a document marked Defendants' Exhibit number 3 for identification purporting to be a manila envelope and I have seen this before. The first time I ever saw it was about ten days or two weeks ago. I found it in the vault.

The Court: Mr. Heth, that is the envelope Mr. Freeman testified about and its discovery?

Mr. Heth: Yes.

The Court: I would not think there would be any serious doubt about Mr. Freeman's testimony.

Mr. Heth: There isn't any doubt about it, but I have got to distinguish this from other reports he has here and that is why I am calling it to his attention.

237 The Court: All right. As far as this envelope is concerned I think there is no doubt that it is the same.

Witness: I knew Mr. Bates. He was my superior for some time as Clerk of the District Court of the United States. He handed me at times reports of receivers and trustees showing the total amount on deposit in the various depositories.

Objection by the Plaintiffs as immaterial. Objection sustained. Exception taken and allowed.

Witness: He handed me these reports from time to time for a period of about four years. I recall when Judge Carpenter resigned as a judge of this Court in 1933 and with
238 reference to the time of his resignation Mr. Bates started giving me reports several years before that, I should say approximately four years before. I filed them away in the vault for safekeeping and I have the reports that I filed away. I have looked through these reports to see if I find any in the list that I have belonging to Sam Howard that purport to have been made out covering the period from June 1931 to June 1932 and there do not seem to be any in here filed previous to 1934 and 1935.

Q. Now do you have any reports of any kind in there covering the year 1931?

A. Yes.

Q. Are any of the reports that you hold in your hands reports that were in Defendants' Exhibit 3 for identification at the time you found it?

A. No. I was requested to make a search of the Clerk's offices for Defendants' Exhibit 3 for identification sometime last May. We searched the vault for several hours and did not find it until about two weeks ago.

Mr. Heth: I think we have gone into that.

Q. Now, in these files that you say you kept, these reports that were turned over to you by Mr. Bates from time to time beginning in 1931 on up to the present time, where did you keep these reports that you now have in your possession?

A. In these two—I started with the one envelope and when that was reasonably full I started another one and had them both in the vault. They were always kept in the envelope. They were placed in the envelope from time to time. No, I never would take the report back in the vault and lay it on a shelf and I did not always place it inside the
239 envelope, but this envelope was in a position where it could be put in that position on the side of the cabinet and I would put the reports in the envelope or stick them behind the envelope and when we got around to it from time to time I would put them in the envelope. To my knowledge

there is not any other place in the Clerk's office where reports of receivers and trustees were kept. I made a thorough and complete search of the office to find this envelope. I kept no other record at all of the number of reports that were filed. I did not put them in a book of any kind and did not stamp them as filed. I did not examine them as they came to me. None of them came directly to me through the mail. Yes, I received them from others than Mr. Bates, from Mrs. Rider, Judge Wilkerson's secretary, and from Mr. Bates' secretary. Mrs. Rider would hand them to me after the resignation of Judge Carpenter from time to time. I do not know of any place in the Clerk's office that I could search now and reasonably expect to find any reports of receivers or trustees. I am positive there are none in the vault.

(Witness excused.)

MARGUERITE GILMOUR, called as a witness on behalf of the Defendants having been first duly sworn testified on direct examination by Mr. Heth as follows:

I am the same Miss Gilmour who testified on direct examination for the Plaintiff in this case. I recall that about two or three weeks ago Mr. Moses and Mr. Heth came to my office and had a talk with me about searching for receivers and trustees' reports. I went in the vault and produced the envelope with the reports in it. When I brought them out of the vault some of them were in the envelope and some
240 on the outside with a rubber band around it. I found them just endwise, right inside the door. There were two envelopes and a number of reports were outside the envelope. I never saw Defendants' Exhibit 3 for identification before. The envelope that I brought out and showed to Mr. Moses and Mr. Heth was not this envelope. It was in the Clerk's envelope. I have never seen a report until the day I gave them to Mr. Heth. I went in the vault and searched to see if I could locate Defendants' Exhibit 3 for identification the day that Mr. Moses and Mr. Heth was there but I could not find it. I have been connected with the Clerk's Office thirteen years. So far as I know there are no other reports of receivers or trustees in the Clerk's office except those that I produced on the day that Mr. Moses and Mr. Heth was there and those which were in Defendants' Exhibit 3 for identification.

No cross examination.

ANNE C. PACHUCKE, called as a witness on behalf of the Defendants having been first duly sworn testified on direct examination by Mr. Moses as follows:

I live at 2838 Diversey Avenue with my people. I am secretary and office manager to Mr. Howard and have been employed by him nine years. I am twenty-eight years old. When I first went into the employ of Mr. Howard, I did his bookkeeping work, prepared his receivers and trustees' final reports and accounts, drew checks in compliance with the orders of the Court and made his deposits. I did not handle his office correspondence at that time but did later on. My activities for him increased as a young lady who was employed by him at the time I went to work left and I then assumed full charge. Her name was Ethel Foster. In addition to what I have stated that work consisted of
241 taking Mr. Howard's personal dictation, answering telephone inquiries, answering inquiries pertaining to estates, by letter, typing petitions, making deposits, preparing reports. In the summer of 1931 I had a talk with Mr. Howard with reference to drafting a letter as to funds on deposit with the depository. I prepared such a letter. You have shown me a letter marked Plaintiffs' Exhibit 1 for identification bearing date June 9, 1931, written on the letterhead of Sam Howard and addressed to Joseph A. Muir. I typed that letter. My initials are on there. The initials S. H. stands for Sam Howard and A stands for my name.

Q. What did you do with the letter after it was prepared by you?

Objection by the Plaintiff as being immaterial. Objection overruled and exception taken and allowed.

A. I prepared the letter after Mr. Howard dictated it to me and I took it into his room and laid it on his desk for his signature. I did not see it after that. To the best of my recollection I made only one copy. You have shown me a copy of a letter marked Defendants' Exhibit 6 for identification, appearing in the book that was identified by witness Claussen. I have looked at this carbon copy and I think it might be the copy of the original letter.

Thereupon the Defendants again offered in evidence DEFENDANTS' EXHIBIT 1 for identification and also offered in evidence DEFENDANTS' EXHIBIT 6 for identification and the witness was asked if she was familiar with Mr. Howard's signature.

A. Yes, sir, that is Mr. Howard's signature.

242 The Plaintiffs objected to this offer and the offer, and the offer of Defendants' Exhibit 1 for identification and Defendants' Exhibit 6 for identification were made separately and the Plaintiffs objected to said offers as made separately on the grounds that they are immaterial which objection was sustained and thereupon the Defendants excepted to the Court's ruling, which exception was allowed. Said Exhibit Number 6 for identification is in words and figures the same as Defendants' Exhibit number 1 for identification.

Mr. Moses: Now, if I may suggest to your Honor, the letter of June 9th that has been filed in this office and that is in the files in the Clerk's office, identified by Mr. Claussen should be received in evidence in this case. It is part of the files of the District Court Clerk, and having in mind the testimony of Mr. Muir it seems to me it ought to be received and admitted in evidence. May I get from your Honor for my own personal help, the basis of your Honor's sustaining that motion? Our theory is that we brought to the attention of the Court, by these reports, the funds on deposit in the depository.

The Court: Let me ask you gentlemen a question for my information. What, if anything, does it offer by way of alleged or certain attempts to comply with the order of June 11, 1931?

Mr. Moses: We will follow up this evidence, if the Court please, with respect to this letter, with evidence showing additional reports were filed; but we are now dealing with a particular letter in question. We content that letter was filed with the Clerk pursuant to a direction of Judge Carpenter, by not only this trustee but by other trustees, about the same time, all of which are contained in the wrapper that is on file in the Clerk's Office in this Court, deposited there by Miss Howard.

The Court: As far as the complaint is concerned, it
243 charges if anything, a failure to comply with the order.

So far as these letters are concerned, that is all they are. They bear on nothing in this case except an attempt to justify the conduct of the Defendant on matters which he claims transpired between him and the Judge.

Mr. Moses: I correct your Honor in one regard. The testimony of Mr. Muir, I don't know whether it stayed in here or whether your Honor excluded it—and I do not want to say anything that may be the basis of at least an offer of

proof; but at the direction of Judge Carpenter Mr. Muir, as Chief Deputy Clerk, called up every one of these trustees and receivers and made the same request of all of them, that they all file those reports, or a large portion of them, and those are in the forms of letters that are contained in the files on deposit in the Clerk's office. It is true that the dates of those letters, or a great many of them, are two days prior to the entry of the order, anticipating the entry of the order, apparently, because that is a fair inference. Mr. Muir said that he was asked by Judge Carpenter to prepare the order. The order was entered two days later. It was all part and parcel of the same transaction. Now, I submit that where the charge is that Howard was careless and negligent in filing these reports with the Court, and that is the charge, we do show by these letters that on June 9 a report to Judge Carpenter of the amount of money on hand in the Phillip State Bank and Trust Company was made.

The Court: Now, what is the inference to be drawn from that, the inference that other trustees were blameless because they told the Judge about a thing that made and should have led to the making of the very order that was made?

244 Mr. Moses: I say this, if the Court please, that the issue in this case is whether Mr. Howard—the issue presented by the theory of the Plaintiff—exercised reasonable care in keeping funds on deposit in the Phillip State Bank and Trust Company. He knew of the practice that required the Court to fix the depository and fix the amount of the depository bond. The Court did nothing, apparently did nothing, because the order here, as shown by the testimony of Miss Gilmour, shows that the bond was not raised. It seems to me that it is fair argument and a fair inference from the fact that the Court undertook to conduct an investigation as to the safety of a depository, that the Court did conduct an investigation, and reached the conclusion it was not necessary to increase the depository bond, at any rate that is the state of Mr. Howard's mind.

The Court: Of course, that shifts the burden of the Plaintiffs, and also charges the Court with being culpable.

Mr. Beebe: Yes.

Mr. Moses: Very good, if the Court please.

The Court: The ruling will be adhered to.

Mr. Moses: It is like, if the Court please, the fact that your Honor, as I understand it, refused to admit this evidence prior because the file mark of the Clerk was not on it. Under

our theory the failure of the Clerk to put a file mark on the document where it had been filed does not mean the document has not been filed. Very good. I preserve an exception.

The Witness: I recollect the receipt through the mails of a document or a copy of a document that was described here as the order of Judge Carpenter of June 11th. It was received about the 12th or 13th of June, 1931, through the
245 United States Mail.

Thereupon this witness was withdrawn temporarily.

BERNARD L. ROSSET called as a witness on behalf of the Defendants having been first duly sworn testified on direct examination by Mr. Heth as follows:

I reside at 2920 Commonwealth Avenue, Chicago. I am president of the Metropolitan Trust Company. During the years 1930, 1931, and 1932, I bought control of the Phillip State Bank, in August 1929, and became president of the bank and remained such for a year and then became chairman of the board.

Q. From what source did you obtain money to buy control of the Phillip State Bank?

Objected to as immaterial.

Thereupon Defendants' Counsel stated he was going to show that this was communicated to Mr. Howard.

Objection overruled. Exception taken and allowed.

A. I borrowed six hundred and some odd thousand dollars from the Central Trust Company secured by half of the stock of the bank and substantial other securities of my own.

The Plaintiffs moved to strike the answer.

Plaintiffs' motion overruled. Exceptions taken and allowed.

Witness: I ceased to be president of the Phillip State Bank in 1930 and Mr. Clarence Beutel became president. Sometime around the first of August 1930 Mr. Beutel and I had a conversation with Mr. Howard at the Devon Trust and Savings Bank. I was president of that bank. Mr. Howard, Mr. Beutel and myself were present at this conversation. As I recall Mr. Beutel phoned me from the Phillip Bank at the Devon Trust on Saturday afternoon and told me Mr. Howard
246 was up at the bank and he would like to have Mr. Howard come down to meet me. I invited them over. They came

down and I met Mr. Howard and Mr. Beutel advised me that Mr. Howard was opening up some accounts at the Phillip and that he might require some credit in the operation of his business because it was necessary for him to advance funds to administer these various estates, and in connection therewith at times required nominal loans, and Mr. Beutel stated he had advised him that the Phillip bank would—could accommodate him in that respect and he wanted me to also meet him, in view of the fact that I was chairman of the board of the bank, and let him know that I was in accord with such procedure if I was. Then we visited back and forth, I do not recall the other details of the conversation, but that was the principal—that was the gist of it, and naturally I discussed our situation and our future prospects. That was the conversation we had. I told Mr. Howard at that time that we would treat him the same as we would any other customer; we would take care of any requirements that he asked for that were proper and he assured us naturally he would not ask for anything that was not proper, so we had no difficulty in having a proper understanding. Subsequent to that time I saw Mr. Howard and I recall the occasion of the failure of the Builders and Merchants' Bank in April of 1931 and subsequent to that date Mr. Beutel and Mr. Howard and I had a conference on the south side in a restaurant at dinner one night. This conversation was a short time after the failure of the Builders and Merchants Bank. I advised Mr. Howard and Mr. Beutel advised him in my presence to the same effect, that we had the full support of the Central Trust Company, that the Central Trust Company had sent out to the Phillip Bank
247 at that time, as I recall, approximately a million dollars to take care of the run which we had; that the officers and directors of the Central Trust Company, had been out to the bank that they had made statements to the effect that all resources—they had been together out to the Phillip bank during the two or three days run. That they had advised us to put up a sign in front of the bank to the effect that the bank was open for business inviting people to come in and get their money which we thought was the best way to assure the depositors that the bank was sound; that they also had made the statement that the total resources of the Central Trust Company were behind the Phillip and Devon Bank. The last statement that I made was with reference to a statement made by an officer. I told Mr. Howard that Mr. Bullard who was vice-president of the Central Trust Company and was sent

out there by Mr. Thayer, Chairman of the Executive Committee of the Central Trust Company, got on a ladder that was in the bank, and the bank was jammed with people drawing out their money, this was in April 1931, and holding up a statement of the Central Trust Company in his hand, copies of which were being passed among the depositors, to the effect that all of the resources of the Central Trust Company were behind the Devon and Phillip Bank. According to that statement as I recall the statement, the resources were over 168 million dollars. I told Howard that he made the statement that the total resources of the Central Trust Company aggregating 168 million dollars were behind the deposits of the Devon and the Phillip bank. The purpose of the visit with Mr. Howard was to assure him of the stability of the bank, and to answer any questions that he might desire
248 at that time. The next time that I saw Mr. Howard that I am certain of was probably in June 1931 when the Foreman National was taken over by The First National and all of their subsidiary or affiliate banks were closed. There was another run on the Phillip bank at that time. I do not recall where I saw Mr. Howard. It may have been in my home, then again it might have been out at the bank or his office. He was up at my home and had dinner one evening but I do not definitely recall where I saw him at this time. I discussed with Mr. Howard the letter that we received from the Central Trust Company being defendants' Exhibit number 5. I told him of my conversation with Mr. Thayer and Mr. Clark. That I went down and saw Mr. Thayer the first thing Monday morning, which was after the Sunday of the merger of the Foreman National and The First National, and advised him I felt that the Phillip Bank and the Devon Trust might require a substantial sum of money to pay out depositors and that he told me not to worry that he knew the banks were both sound and that they were prepared to stand behind these banks and that he would do something for me by evening so I stayed around most of the day and about five thirty or thereabouts Mr. Thayer presented me with a letter, which is the Defendants' Exhibit 5, and that Mr. Thayer asked me whether I thought that letter would do me any good. As a matter of fact, Mr. Thayer gave me two letters, they were both identical, and I told Mr. Howard that I asked Mr. Thayer, "What does this letter mean?" and he said, "Well, it means that we will support you to the last dollar of deposits," and that I asked him whether I could make photo-

static copies of it and send them out to the depositors be-
249 cause I said, "There are several accounts I want to give this letter to" and he assured me I could. This was the reason I was showing this to Sam Howard and intended to show it to others. I sincerely felt that the bank was sound and I told Mr. Howard. I told Mr. Howard of the substantial sums of deposit that I had in the bank personally, although I advised him that I felt that being personally interested in these deposits it was not the same as if it were his money, because he should have more protection than I. I told him that I was interested in several hundred thousand dollars, funds on deposit in the Phillip bank, and Mr. Howard was satisfied that we had the full support of the Central Trust Company, and told me, that he saw no reason why he should worry about the deposits, that with the Foreman bank closing and other downtown banks possibly in no better shape than the outlying banks that he did not know what he would do if he did take the money out of there, what bank he would put it in if he did take it out.

Mr. Beebe: He told you that or you told him that?

A. Well, we probably were mutually in agreement on that score.

Mr. Beebe: I move that it be stricken, your Honor.

The Court: Strike it out.

A. Well Mr. Howard said he would continue to deposit in the Phillip bank as long as we had the full support of the Central Republic or the Central Trust. I told Mr. Howard that if he took the money out he would have to put it in some other accredited bank that was entitled to have Federal funds and with us having full support of the Central Trust
250 Company which was a representative downtown bank I did not know where he could put it that would be any safer. I further told him at that time that I had had conversations with Mr. Thayer, and several directors of the Central Trust Company, and had practically completed arrangements wherein they had arranged to form a company to take over the interest that I had in the Phillip and The Devon banks and that they had advised me not to bother about paying interest on my loan in the bank which was over two thousand dollars a month, that is interest on my loan from the Central Trust, and that they told me not to worry about the 450 thousand dollars I owed them because that would be taken up when they formed a company, and that I had done all this notwithstanding the fact that George Woodruff had asked me to sell

out to a company that he had formed. Yes, this was all conversation with Mr. Howard. George Woodruff was president of the National Bank of the Republic that merged with the Central Trust Company. We made photostatic copies of the letter I received from Mr. Thayer that was signed by Mr. Clark and that is Defendants' Exhibit 5 in this case and also made an enlarged copy and put it up in the lobby of the bank, in the various windows of the bank.

The Phillip State Bank had an executive committee or an advisory committee composed of directors of the bank, the advisory committee acted as an executive committee. Mr. Thayer chairman of the executive committee and a director of the Central Trust Company, Mr. Peranto who as I recall was a director of the Central Trust Company and a director of various banks which Mr. Thayer was interested in, Mr.
David Shanahan, Mr. Allen Dixon, Mr. Frank Webb who
251 was president of several banks that Mr. Peranto and Mr.
Thayer were interested in, and two or three other men whom I do not recall composed the advisory or executive committee of the Phillip State Bank. I talked with Mr. Howard about this Committee and told him of their affiliations. Offhand I would say the first time I spoke to him about it was within a few days after the advisory committee was arranged I do not remember whether it was in April of 1931 or February of 1931. From time to time after that I discussed with Mr. Howard the existence of this Committee. I told him the purpose of the committee was in line with the arrangements that I had made to turn control of the Phillip and the Devon and the Ogden bank, which I was interested in, and The First National of Wilmette, into this company, which company would consist of all of the banks that these men at the Central Trust Company were interested in, and that was the reason why we had arranged an advisory committee consisting of the same men that were in the other banks.

Subsequent to the conversation that I had with Mr. Howard around June of 1931 I saw Mr. Howard every month or two and sometimes oftener. My downtown office was across the street from his. I do not know that I had occasion to see Mr. Howard every time we had a run out at this bank. The next run was about September as I recall so I am certain I at least saw him then. I remember having a conversation with him at his office. I do not recall any one being present except Mr. Howard. I told him as I recall that the so-called Bain bank chain closed; it was 12 or 15 banks all over town, and pre-

cipitated another run; and I told him we were having withdrawals again, that we had arranged to borrow sufficient
252 money from the Central Republic Bank to take care of all demands, and that I had been assured that they were prepared to furnish us with all the money we needed; that we had paid off or substantially paid off the prior loans and did not anticipate any trouble of any kind.

If I recall we had some difficulties in December or January, there were a lot of rumors around and the rumors had gained sufficient volume that there was a sort of a steady drain and it was again necessary to borrow from the Central Republic. My conversation with Mr. Howard from time to time were merely you might say a reiteration of our financial condition and the continuous support that we had from the Central Republic. I told Mr. Howard furthermore that we were sending a daily statement down to the offices of the Central Republic showing our financial condition. I again told him that the Phillip State Bank with the support and affiliation we had with the Central Republic Bank was as safe and sound in my opinion as any downtown bank.

I do not recall any run in the Spring of 1932, yet I know we had them so thick and fast that I cannot recall every one of them. I do not recall any particular conversation that I had with Mr. Howard after December, 1931, or January of 1932. I would see him possibly once a month and sometimes talked to him over the telephone in between time. I had no particular business to discuss with him outside the bank. I do not know that I can tell you anything I said to him after that time any more than what I have already stated. There was not any placid condition in banking circles between 1930 and 1932. I do not recall that there were any runs in the
253 Spring of 1932. There were a lot of unfavorable rumors about every bank. Occasionally they would strike at one particular bank but I do not recall any sustained withdrawal until two or three days prior to the closing of the bank.

On cross-examination by Mr. Beebe defendants' witness BERNARD L. ROSSET testified as follows:

In August, 1930, I was interested in the Phillip State Bank, the Devon Trust and Savings Bank, that was approximately a mile away from the Phillip and the Ogden National Bank out on Crawford Avenue near 22d Street. I am not sure

whether at that time I was interested in The First National Bank of Wilmette. The way I became interested in that is I was associated with Mr. Thayer, Mr. Peranto, and Mr. Shanahan in the purchase of control of that bank and I believe that was in August, 1930, or thereabouts, I do not recall; but I did not acquire the interest that I contemplated although I did have a small interest. It was not known as one of the Rossett chain. The three banks that I mentioned before the Phillip, Devon, and Ogden were what were known as the Rosset banks. I bought control of the Ogden in 1927, the Devon in 1928, and the Phillip in 1929. At present I am president of the Metropolitan Trust Company. We do not accept deposits or make loans. I have been president of this company for three years. It has not always been known as the Metropolitan Trust, and was formerly known as the Cook County Trust Company but I believe it has always been known as the Metropolitan Trust since I owned it. I became president of this company in June, 1932 or July, I am not certain. I did not say that the 254 deposits that I mentioned when talking with Mr. Howard in April, 1931, were my personal deposits. I said deposits in which I was personally interested. They were not all mine, all of the funds were not mine personally, they were companies or trusts which I was personally interested in and personally responsible for. In April, 1931, I would say offhand I had on deposit of funds of this kind in excess of two hundred thousand dollars. As to the names of the institutions or organizations that I was interested in and responsible for the money that had moneys on deposit I wonder if there is a list of the larger accounts of the bank and the day they closed. The building in which I was living was interested in as I recall some twenty thousand dollars. That is the building at 2920, Commonwealth Building Corporation. Of course I cannot now remember whether this was in 1931 or 1932 when they had these deposits. The bondholders committee which I was chairman of had various accounts in the bank. That was the Straus bondholders and a substantial part of the funds were deposited in the Phillip State Bank but not all of them. At the time I talked with Mr. Howard I expect in excess of one hundred thousand dollars were on deposit. I am trying to make a guess. That is why I asked for a list of the larger accounts. I say I was personally interested in this money due to the fact that there was a reorganization of some of the properties and I personally made good for a large portion of that. Then in addition to that I had on deposit there belong-

ing to the Metropolitan Trust Company 157 thousand dollars. That was in 1932 the best I can tell.

Witness: As to whether it was in April, 1931 that I told Mr. Howard that I had a very large amount of money on
255 deposit in the bank for which I was personally responsible that could best be determined by the facts, whether I had it there in April, 1931 or whether I had it in April, 1932.

Witness' last answer stricken on motion of the plaintiffs.

A. That is the best statement I can make.

Q. Well now then you may not have told Mr. Howard of these deposits at your conversation in April, 1930, is that so?

A. Yes, that is right.

Q. Now did you tell Mr. Howard in April, 1931, the condition of your bank, the financial condition?

A. Yes, I did.

Q. As I understand from your testimony you made clear to him the financial condition of your bank in each of the discussions, or the majority of the discussion that you had with him from time to time, commencing in April, 1931 and continuing clear down to June, 1932.

A. Well you say I made it clear; you say you understand I made clear the financial condition of the bank. That covers a lot of territory. I did not go into the bond account, the loan account, or any of the details of our balance sheet.

Q. Did you at any time do that?

A. Well, I went over our balance sheet showing what the items consisted of.

Q. You did do that?

A. I went into the details of our affiliation with the Central Trust Company which was, after all, the big factor. There is no bank irrespective of its size, that can liquidate over night.

Mr. Beebe: I am not asking you that. I move to strike it out.

(Stricken.)

Q. I do not care anything about a lecture. I am asking you what you told Mr. Howard.

A. Do you want me to repeat again what I said to Mr. Howard?

Mr. Beebe: No.

Q. It is my understanding that there were occasional
256 times when you went into your balance sheet with Mr. Howard?

A. Yes, that is right.

Q. Now that was occasionally from April, 1931 down to June, 1932?

A. Yes, sir, that is right.

Q. But each time you accentuated the idea another bank was going to pay your debts if you were in any difficulty?

A. Well, hardly.

Q. Isn't that a fact?

A. I did not say that.

Q. You can answer that yes or no.

A. A bank was going to pay our debts?

Q. Answer that yes or no.

A. Well, I do not think it is fair to answer it yes or no. I would like to answer it.

Q. Isn't a deposit a debt?

A. Well yes a deposit is a debt.

Q. All right. Then what you were trying to make clear to Mr. Howard was that a different bank would pay your debts if you were called on quickly for them?

A. That is right.

Q. Yes.

A. Yes, that is right, although I do not like the word "debts," because we had deposits.

Mr. Beebe: I move the last voluntary statement be stricken.

(Stricken on Plaintiffs' motion.)

A. I probably did tell Mr. Howard how much the bank lost between April and July, 1931 in total deposits. I saw no reason to hide anything from Mr. Howard. That would certainly show in the balance sheet.

The greatest amount of deposits that the Phillip State Bank had while I was connected with it I think was 4,000,000 dollars, I am not certain. I do not think it ever had five million dollars while I was president, I mean while I was associated with the bank either as president or chairman of the board. I do not know that reports were made every day to the board by departments of the bank. They may have issued a daily statement each two or three days I am not certain about
257 that, but it is not customary as a rule to make a statement every day. I received a statement every day. You have called my attention to something marked advisory board statement. I saw those. They went down once a month I think or oftener I do not recall. We did not use them in the daily course of our business. They were prepared for the officers and directors to see the situation. They are correct. Yes, I had to do with the questions of policy of the bank. I have

looked to the back sheet and it refers to overdrafts and I notice whose overdrafts these are, all except one. Those are in Mr. Howard's personal overdrafts. They are overdrafts in certain receiverships and trustees' accounts which were possibly made good the following day or shortly thereafter. I paid particular attention to the overdrafts. That was the first thing I ever looked at and I inquired always into the
258 reason for the overdrafts, not only that I paid attention to the overdrafts but the State Bank Examiner and the Clearing House Examiner paid attention to overdrafts and I have no doubt but that there is a good reason for every overdraft there and that they were made good. I do not know that these overdrafts were a continually occurring condition as to some of these accounts of Sam Howard as Trustee and Receiver. The statement would be the best evidence of that. I cannot remember. No, I do not remember anything about that. I do not remember commencing with August, 1930 and ending June 21, 1931, that Howard had an average somewhere near $1,700 overdraft on all of the accounts as a whole. Saying the average deposits were from two hundred forty-nine thousand to four hundred sixteen thousand dollars, this would be less than one per cent of his account average in overdrafts, one half of one per cent. If you say that is a fact I will agree to it. The bank did not extend to Mr. Howard the privilege of having overdrafts in some of these estates, any special privileges that we did not extend to any other customer. If we felt that that particular account—and we knew that each account stood on its own feet. Mr. Howard was not trustee for 123 trusts all in one deposit but he had to account for each one separately. If there were funds coming into that account, and he had to pay a check for some particular reason, we would honor that check if it was a small amount, and that practice applied to any customer. You take into consideration the amount of business you have from that customer, whether you are warranted. What you are substantially doing is making him a loan. When you allow an overdraft you are loaning a man money. You naturally de-
259 termine whether that loan is safe, also having in mind the convenience that you may care to extend based upon other business.

The Plaintiffs move to strike out all of witness' answer with the exception of that part that refers to the privilege of extending overdrafts to Sam Howard. Motion allowed. Exception by the Defendants taken and allowed.

Mr. Heth: The question was whether there was a special privilege granted to Mr. Howard in respect to overdrafts. I submit the answer is responsive.

The Court: The answer is an attempted lecture on overdrafts.

Mr. Heth: Exception.

The Witness: I do not know how to answer the question.

Q. I notice there an item of $81.76 for the Star Hat Works, is that a small item?

Objection.

Mr. Beebe: I am trying to get what he means when he says to the extent of small items.

The Court: Yes, the answer in respect to that came in what I characterized as an attempted lecture. It is stricken out. The question that was asked him was with respect to extending the privilege of overdrafts. It could have been answered yes or no.

Mr. Beebe: Can you answer that yes or no?

A. Yes. It was in April, 1931 that I told Mr. Howard about Mr. Bullard climbing on a step-ladder at the Devon bank. I recall that in June, 1931 there was a story in the Chicago Tribune about the Foreman Bank condition, June 8th, that there was an announcement that The First National would take over the Foreman. That was an announcement of the merger of the National Bank of the Republic and the Central Trust. I was not sure whether it was a couple of days afterwards or simultaneously. I think it was a little later
260 than July the 17th that the bank was doing business as the Central Republic. Sometime around there if I remember.

Q. So that the Central Trust Company as the Central Republic ceased doing business sometime in July or early in August, 1931?

A. Well, I do not know whether they operated as a separate bank or not during that time, but I imagine they did; they would have to.

Q. Afterwards you know they operated as a single bank?

A. That is right.

Q. Calling your attention to the letter—I am not asking you what it is but the words, "Consistent with sound banking practice" in the letter of June 12, 1931, is a limitation is it not?

A. A limitation of what?

Q. A limitation of preparedness to lend them further sup-

port consistent with sound banking practice; that is a limitation of the support that is to be lent is it not?

A. It may be. To me it is an introductory paragraph.

Q. There is a clause in this letter "are prepared to lend them further support consistent with sound banking practice." You assumed that was a limitation did you not on the language just before it?

A. I would, personally, yes. Yes, I talked with Mr. Howard in August or July of 1930 I believe it was August but it may have been July, I know it was in the summertime. It was just before or immediately after he commenced to deposit in the bank. Mr. Beutel talked with him first. He had known Mr. Howard for several years. Mr. Beutel brought him to see me.

Q. Well was the conversation of this character, that Mr. Howard had certain debts oweing to other banks, and he wanted to have those debts paid by loan from this bank and he wanted to have certain advances, without security, from this bank if he comes in.

Mr. Heth: I submit that is not only double but it is
261 triple, quadruple as to the number of things in it.

Mr. Beebe: Did you answer that?

A. I did not say anything. I started to.

Mr. Heth: I object to that question because it cannot be answered yes or no.

The Court: How do you know it cannot be?

Mr. Heth: It contains too many subjects.

The Court: How do you know that?

Mr. Heth: Because one might be true and the other not.

The Court: Let the witness say.

Mr. Heth: Then he cannot say "No."

The Court: Yes, he can.

Mr. Heth: Part of it might be true and part not.

The Court: Yes he can. The question is was the conversation of a certain purport and form and substance.

Mr. Heth: It has so many things in it.

The Court: That is all right. Let him answer.

262 (Question read to the witness.)

A. I almost have to say yes and no. Part of that was said and part was not said.

The Court: Tell us the conversation in respect to the subject matter.

A. I partially answered that question once before but I will go over that again. I met Mr. Howard and we discussed

the sort of accounts that we carried, and the nature of his business. I am not sure as I say, whether he had already opened up some accounts at the Phillip State Bank or whether he was preparing to open some, but he advised us in connection with his business that it was necessayr for him to borrow money from time to time; he was required to make advances in the operation of his office in the carrying on of his job; that he did not go in either for compensation or for the return of the advances he made until the estate was closed, and whether we would be prepared to accommodate him in such instances. I told him if his business warranted accommodations, and his personal resources or fees that he had coming warranted it we would. I connection with that we inquired of him what accounts he had and where he maintained these accounts. As I recall, he told me he kept some accounts in the Foreman Bank, or some other banks, I do not remember which other ones now, and that he owed them some money and that he did not feel he would want to take any of those accounts away if he did not pay them; and if his association with us was satisfactory, and we got along, we wanted that business we possibly could get it; I also have a mental reservation. I thought I would like to see—

Mr. Beebe: Just a minute. I don't care anything about a mental reservation.

263 The Court: Just give the conversation.

A. I also told him "We will get started and see how things work out. If it is mutually satisfactory, fine. If not, there is no harm done because we will not loan you any more money than what you think you can pay back, and you will not have any accounts that you do not think you can draw out."

I did not understand in these conversations with Mr. Howard that he was keeping all of the moneys that he had intrusted to him as trustee or receiver in bankruptcy accounts in the Phillip State Bank. I did not know enough of his personal affairs to know whether he was keeping all of them in there or not. I do not know whether Mr. Beutel had an agreement with him or not. I do know that the bank loaned him money on unsecured loans and that the amount ran between five thousand, the first loan, and about eleven thousand at the end of August 1930 and went as high as about $18,150.00 and I know that the loan had not been paid up to the time that the bank closed. I did not know that Mr. Howard carried in the bank a number of items running from $249,000 at the end

of August 1930 to approximately $416,000 in 1932, I did not know that he had that much money there. Aggregating Mr. Howard's account as one he was the largest depositor as far as I can recall. This money was deposited in the commercial account and continued in the commercial account but I did not handle the accounts myself and I do not know whether it continued with out any effort to change it at least until June 1932. I did not have a discussion in June 1932 with someone assuming to represent Mr. Howard about changing these accounts to a different character of account.

264 Q. Somebody used the words "placid condition." I did not quite get your answer. Was it that there was no placid condition in 1930, 1932, or was it there was no placid condition in 1932?

A. I said that.

Q. In banking circles?

A. I did say there was rather an uneasy situation from 1930 to 1933, to put it mildly.

ANNE C. PACHUCKE recalled as a witness on behalf of the Defendants on further direct examination by Mr. Moses testified as follows:

After receiving through the mail a certified copy of the Court's order of June 11, 1931, I prepared a report or another statement for Mr. Howard upon receiving the bank statements for the amount of June from the Phillip State Bank and Trust Company. I prepared this report around July the third. I took the bank's statements and tabulated them on the adding machine and took the balances of the estates for the month of June and totaled them and after I totaled them I prepared a typewritten statement.

Objection by the Plaintiffs because if there is anything here to show this it is the best evidence.

Mr. Beebe: I would like my objection to stand to this line of testimony.

The Court: Yes.

Objection overruled and exception taken and allowed.

A. I prepared a typewritten statement and headed it, "Balances as of June 30, 1931, in the respective depositories. Then I listed Phillip State Bank and Trust Company and

265 the Foreman National Bank in which Mr. Howard had funds as receiver or trustee. I then prepared a letter of

transmittal addressed to Mr. Joseph A. Muir, Chief Deputy Clerk of the United States District Court. I put the letter and the report on Mr. Howard's desk for his signature. That is all I had to do with it. Carbon copies were made of that report. I prepared a similar report for Mr. Howard around the third or fourth of October, immediately upon receipt of the bank's statements from the Phillip State Bank and Trust Company of moneys on deposit in depositories as of September 31, 1931. I prepared this report by tabulating the balances that were shown on the statements on the adding machine. I totaled them and prepared a statement showing the balances in the Phillip State Bank and Trust Company and in The First National. I prepared a letter of transmittal. I did substantially the same thing in the early part of January, 1932, as to December 1931 and the same thing in April 1932, showing the balances as of March the 30th, 1932. I did not prepare any June statements as the bank had failed on June 21, 1932. I kept carbon copies of all these statements. I kept them in a manila folder and that has been misplaced or misfiled, cannot be located. I have made a search for the folder.

Mr. Beebe: I object to all of this testimony if nothing is going to be produced here except the unsubstantiated statements of certain persons.

The Court: I take it he is laying the foundation attempting to establish lost documents. Go on.

Witness: I kept these statements with the letter, carbon copies, in a manila folder in a filing box on the top of my
266 filing cabinet. We had occasion to change our files several times and we also had a file room, and I cannot conceive where they might be because I cannot locate them. I have looked for them in the file room, in the files, and think they might have got mixed up with some other files and on the 17th floor in the store room that we have. I found several tapes, adding machine tapes, and I have these here, they are dated December 31, 1931, and March 31, 1932. By reference to these tapes I can tell the figures that were put on the letters and that shows on the bank's statements as of these two dates and that were put on the reports for these dates.

Objection by the Plaintiffs. Objection overruled. Exception taken and allowed.

A. The amounts, refreshing my memory from these tapes the amounts I put on the letters and reports were, in the Phillip State Bank and Trust Company as of December 31,

1931; there was $258,624.98 on deposit in the receivers and trustees' accounts. I put this figure on the report as of that date. And I put the name of the Phillip State Bank and Trust Company in the report opposite these figures. Refreshing my recollection by an examination of the other tape as to what figures were contained in the report as of the date shown by that tape (March 31, 1932) the amount of $385,632.85. In connection with the making of these reports Mr. Glaeser helped tabulate statements, he used the adding machine while I called the balances off to him. The time he did this was around the Christmas Season, that was the first of January, 1932, and he later helped me in April of 1932.

I didn't file a report of June, 1932, because I had no bank
267 statement from the Phillip State Bank and Trust Company and did not get such statement until several months after the closing of the bank, and then as of September 30, 1932, I prepared a further statement and it was submitted to the Court on the second or third of October, at which time I had the bank statement that I had received from the receiver of the bank. I subsequently prepared a similar statement. All statements were handed to Mr. Howard. I had nothing to do with the filing of them.

I have made up a tabulation of all of the cash advances made by Mr. Howard in his individual capacity to himself as receiver or trustee in the various estates that are involved in this litigation. I have looked at a paper marked Defendants' Exhibit 7 for identification and it is a tabulation of all advances that Mr. Howard made in the estates which he might have handled as receiver or trustee that are tied up in the Phillip State Bank and Trust Company and involved in this suit. I took this statement from the vouchers and receipts and I have the originals in my possession.

Thereupon the Defendants offered in evidence DEFENDANTS' EXHIBIT 7 for identification being a statement of cash advances made by the Defendant Sam Howard personally in estates tied up in the Phillip State Bank and Trust Company and for which he has never been reimbursed.

Thereupon the Plaintiffs objected to this offer on the ground that it is immaterial. Objection sustained. Exception taken and allowed.

Said Defendants' Exhibit number 7 for identification so offered is as follows:

268 Said Defendants' Exhibit 7, for identification, so offered in evidence and refused, is a document headed

"Cash Advances Made by Sam Howard Personally in Estates Tied Up in the Phillip State Bank and Trust Company and for which He Has Never Been Reimbursed", setting out the names of each bankrupt estate in connection with which said advances were made and listing separately under the name of each such estate each advance made for said estate by Sam Howard, personally, while receiver thereof, the date of such advance, what it is for and the amount thereof, and setting out each advance made for said estate by Sam Howard, personally, while trustee thereof, what it is for and the amount thereof, and setting out separate totals of the amount advanced while receiver and trustee of said estates, containing in all approximately 925 separate items of advances listed under approximately 127 separate estates in bankruptcy and showing the total of said advances as $12,541.20, and showing to whom said advances were made and that the same were for such matters as custodian services, insurance, drayage and hauling, inventory services, bookkeeping services, certified copies of court records and other papers, mimeographing notices, postage, telephone, stenographic services and other incidental expenses in connection with the administration or operation of said estates; all of which it is stipulated and agreed may be considered as Defendants' Exhibit 7 for identification, in lieu of setting out said document in detail and in full.

269 Mr. Moses: We desire to show, if the Court please, or offer to prove by this witness, that Mr. Howard made advances out of the accounts of the Phillip State Bank
270 and Trust Company by voucher and check, of which I have duplicates in my hand which I shall likewise ask to have marked, to show the trustee's cash advances and the receiver's cash advances.

Mr. Beebe: I object, it is immaterial.

Mr. Moses: I know you objected to this. I presume you are objecting to that. I am simply making my offer, if the Court please, to show the total amount of cash advances to the various estates by him out of his individual accounts, payments being made by checks or vouchers drawn on the Phillip State Bank and Trust Company in these various estates; and I also offer to show that they are in payment of the cash advances to him by vouchers, countersigned by the referee in bankruptcy.

The Court: The ruling will be adhered to.

The Witness: I knew of a general and uniform and well-

known custom in the City of Chicago in practice in the Federal Court with respect to receivers and trustees making advances out of their individual funds.

Plaintiffs object to proof of any such custom. Objection sustained. Exception taken and allowed.

Thereupon the Defendants offered to prove by this witness that in the District Court of the United States, Northern District of Illinois, there existed for perhaps the last ten years a custom, at least within the knowledge of this witness during the time she was working for Mr. Howard, whereby trustees and receivers in bankruptcy appointed by the District judges of this Court had the habit, with the approval of the referee in bankruptcy and of the judges of the Court, of advancing moneys out of their individual funds on deposit in the bank to the estates which they were administering
271 in bankruptcy, for the purpose of paying small items of expense such as certified copies of orders of the Court, bookkeepers' services, inventory services, postage stamps, custodian services, calling services, insurance and items of such small character, for which they received reimbursements from the estates for which they were trustees or receivers pursuant to an order of the Court entered upon the filing of a final report by such receivers and trustees in bankruptcy, first before the referee which reports were afterwards approved by the Judge of the Court, and that the total amount of such advances made by Mr. Howard in the particular estates involved in this case amounts to $12,991.00 and some cents.

Objection by the Plaintiffs because it is immaterial and improper. Objection sustained. Exception taken and allowed.

Witness: I prepared all of the receivers final report and accounts of the estates that Mr. Howard handled. I have looked at a document handed me which purports to be a carbon copy of the receivers final report and account in the matter of A. Klein, bankrupt, and I prepared this report and account.

Thereupon said document was marked Defendants' Exhibit 8 for identification.

Witness: That form, being Defendants' Exhibit number 8 for identification, was in general the form of accounts that I prepared, that is final account and reports of receivers in the bankruptcy cases that Mr. Howard was acting in.

Thereupon for the purpose of showing the form that was

used by Mr. Howard in such cases in making final reports and accounts as receiver the Defendants offered said
272 document identified as DEFENDANT'S EXHIBIT 8 in evidence for the purpose of showing that in the final report these advances were listed as part of the liability of the trust by the trustee.

Objection by plaintiffs as immaterial and prepared apparently after August 4, 1933, and because showing of any of these advances is immaterial. Objection sustained. Exception taken and allowed.

A. The form that I have just identified, Defendant's exhibit 8, was the general form that I adopted in all reports and was used with respect to reports filed during 1930, 1931, 1932 on behalf of Mr. Howard.

Same objection by plaintiffs. Objection sustained, exception taken and allowed.

Q. I show you what purports to be a form of the trustee's first report and account?

The Court: Is that for the same purpose?

Mr. Moses: Yes.

The Court: The same ruling and you may have the same exception.

Mr. Moses: May we consider these documents marked for identification if the court please as being offered, the first trustee's report and account and then the trustee's second report and account and the trustee's final report and account.

The Court: The same ruling.

Mr. Moses: I have here in my hand the form of a
273 trustee's second report in the estate of Kleir incorporated and the form of the third and final report and account of the trustee in said estate and a final distribution sheet in said estate that I propose to interrogate the witness about along the same lines that I have already pursued with reference to the receiver's final report and the trustee's first report showing the approval by the Referee in bankruptcy of the repayment of some of the cash advances made by Mr. Howard in a given estate and I offer to prove by this witness that these were the forms that were used in making up Mr. Howard's various reports in the estates in controversy wherein he was trustee and receiver and the forms generally followed in these estates, the same as I have offered to prove in connection with the form identified as Defendants' Exhibit number 8 and I am having these forms marked for identification as Defendants' Exhibits 9, 10, 11 and 12 and I offer

them all in proof for the purposes as stated in connection with the offer of Defendants' Exhibit number 8 for identification.

To all of which offers the Plaintiffs objected on the grounds previously stated which objection the Court sustained to which ruling of the Court the Defendants excepted, which exception was allowed.

The documents marked DEFENDANTS' EXHIBITS 8, 9, 10, 11 and 12 respectively for identification and offered in evidence are as follows:

274 DEFENDANTS' EXHIBIT 8, for identification, so offered in evidence and refused, is a final report and account of Sam Howard, as receiver in the case of L. Klier, Inc., Bankrupt No. 53229, U. S. District Court, Northern District of Illinois, Eastern Division, on page 2 of which report appears the statement that he, Sam Howard, has advanced the sum of $104.93 which became necessary in the administration of said estate and for which amount he recommends that he be reimbursed, all of which is set out in detail in statement attached thereto and marked Exhibit "B" and made a part thereof; and on page 2 of which report appears the following: "Wherefore, your receiver respectfully prays that a meeting of creditors be called for the purpose of considering this, his receiver's final report and account, and at such meeting your receiver respectfully prays that the following orders be entered: (a) Order directing trustee to reimburse your receiver in the sum of $104.93, representing cash advanced which became necessary in the administration of said estates—", attached to which final report and account is Exhibit "B", being an itemized statement of the cash advanced by the receiver which became necessary during the administration of said estate and for which amount he should be reimbursed as follows:

"June 10th, 1933, Charles M. Bates, Clerk of the U. S. District Court, for two certified copies court order approving receiver's bond $1.30
June 17th, 1933, Edward Gallagher, for services rendered taking inventory of assets on 6/12/33, one day and one evening 10.50
June 27th, 1933, Maurice Wiedelman, for services rendered as custodian from 6/15/33 to 6/27/33 inclusive, 13 days at rate of $5.00 per day 65.00
275 July 17th, 1933, M. Levy, for services rendered delivering third party merchandise, also books and records of bankrupt estate to receiver's office $2.50
September 28th, 1933, Henry S. Slipner, earned premium on fire insurance 2.98
Edward Gallagher, for services rendered checking auction sale on June 26th, 1933 5.00
Stenographic services rendered answering necessary correspondence, typing petition to sell assets, mailing notices of sale to creditors and parties interested, typing affidavit of mailing, report of sale, receiver's final report and account, etc., 11.20
Postage, telephone and incidental expenses 6.45

Total Cash Advanced $104.93"

On pages 1 and 2 of said receiver's final report appears the following statement:

"Your receiver further reports that he has received from all sources the sum of $380.45; that he has disbursed the sum of $15.80 for appraiser's fees and tax on checks, and that he therefore has a balance of $365.37, and this sum has been turned over to himself as trustee, he having qualified and now acting as such—".

It is stipulated and agreed that the following may be treated as Defendants' Exhibit 8, for identification, in lieu of setting out said document in detail and in full.

276 DEFENDANTS' EXHIBIT 9, for identification, so offered in evidence by the Defendants and refused, is the first report and account of Sam Howard as trustee in the estate of L. Klier, Inc., Bankrupt No. 53229, U. S. District Court for the Northern District of Illinois, Eastern Division, on pages 1 and 2 of which report, among other things, appears the following:

"Your trustee further reports unto your Honor that after payment of the liabilities incurred and cash advanced as

herein reported in the receiver's final report and account in this cause, and costs of administration, the balance thereof will not be sufficient with which to declare a first dividend to creditors whose claim has heretofore been filed and allowed, and therefore, respectfully recommends that the matter of the declaration of the first dividend to creditors, out of the funds that may remain after the payment of expenses and costs of administration, be deferred until the final meeting of creditors to be had in this proceeding."

Attached to said trustee's first report and account is Exhibit "A", being first account of Sam Howard as trustee in this estate, and listing "Receipts", "Disbursements", "Cash Advanced", "Liabilities Incurred", "Recapitulation", and showing under the item of "Cash Advanced", "None".

On page 1 of said trustee's first report appears the following statement:

"Your trustee further reports unto your Honor that he has received from all sources the sum of $365.37; that he has made no disbursements therefrom, and, therefore,
277 has on hand the sum of $365.37 which is on deposit in the American National Bank and Trust Company."

It is stipulated and agreed that the foregoing shall be treated and considered as Defendants' Exhibit 9, for identification, without setting out said document in detail and in full.

278 DEFENDANTS' EXHIBIT 10, for identification, so offered in evidence by the Defendants and refused, is the second report of Sam Howard as trustee of the estate of L. Klier, Inc., Bankrupt No. 53229, U. S. District Court for the Northern District of Illinois, Eastern Division, attached to which report is Exhibit "A", being second account of Sam Howard as trustee of said estate, listed on which exhibit are the following headings: "Receipts", "Disbursements", "Cash Advanced", "Liabilities Incurred", "Recapitulation", the items listed under the heading "Cash Advanced", being "None."

On page 1 of said trustee's second report appears the following statement:

"Now comes Sam Howard, trustee of the above estate, and submits herewith his second report, and for report says that the total receipts to date are $365.37, as shown by your trustee's first report; that the total disbursements to date are $58.69; the liabilities incurred are $5.00; and the balance now on hand, and deposited in the American National

Bank and Trust Company, is $306.68, all of which will more fully appear from the trustee's second account hereto attached."

It is stipulated and agreed that the foregoing shall be considered and treated as Defendants' Exhibit 10, for identification, in lieu of setting out said document in detail and in full.

279 DEFENDANTS' EXHIBIT 11, for identification, so offered in evidence by the Defendants and refused, is the third and final report and account of Sam Howard as trustee in the estate of L. Klier, Inc., Bankrupt No. 53229, U. S. District Court for the Northern District of Illinois, Eastern Division, on page 1 of which report, among other things, appears the following:

"—that your trustee has advanced cash for which he should be reimbursed in the sum of $17.35;—"

Attached to said third and final report is Exhibit "A", being the third and final account of Sam Howard as trustee of said estate, on which the following headings appear: "Receipts", "Disbursements", "Cash Advanced", "Liabilities Incurred", "Recapitulation". Under the hearing "Cash Advanced" appears the following:

"Stenographic services rendered, answering necessary correspondence, typing trustee's first, second and third accounts, addressing final meeting notice cards, making up checks from final distribution sheet, etc.,	$11.05
Postage, telephone and incidental expenses	6.30
Total Cash Advanced	$17.35"

On page 1 of said third and final report of said trustee appears the following:

"Your trustee further reports that total receipts in said estate are $515.37, the total disbursements are $58.69 and the balance on hand on deposit in the American National Bank and Trust Company is $456.68;—"

It is stipulated and agreed that the foregoing may be treated and considered as Defendants' Exhibit 11, for identification, in lieu of setting out said document in full and in detail.

280 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

In the Matter of
L. Klier, Inc., a corporation, Bankrupt. } In Bankruptcy No. 53229

Final Distribution Sheet.

	Balance on deposit, American National Bank & Trust Co.,		$ 456.6
2	Sam Howard, Receiver's Commission,	$ 22.83	
3	" " " Cash advanced,	104.93	
4	Continental Casualty Co., Premium on Receiver's Bond,	10.00	
5	Nina B. Maxey, Services re inventory of assets,	4.05	
6	Mrs. Marie Klier, Rent,	60.00	
7	Sam Howard, Trustee's Commission,	30.61	
8	" " " Cash advanced,	17.35	
9	Continental Casualty Co., 1st and 2nd annual premium on Trustee's Bond,	10.00	
10	Wm. H. Jaffe Printing Co., Final Meeting Notices,	5.50	
	Cash paid to wage claimant, 2nd and final dividend,	20.15	
11	Arthur Chittick, Attorney for Trustee, fee	29.88	
	costs	2.50	
12	Goldman, Allshouse & Heal, Attorneys for Petitioning Creditors, fee	29.88	
	costs	43.90	
13	Theodore A. Spence, Attorney for Bankrupt, fee	14.94	
14	Carl R. Chindblom, Referee's Expenses,	46.51	
15	Carl R. Chindblom, Referee's Fee for filing claims,	3.25	
16	Carl R. Chindblom, Referee's Commission,	.40	
			$ 456.6

Rec'd May 17, 1935
Checks made May 17—1935 OK
Mailed

281 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

In the Matter of
L. Klier, Inc., a corporation,
Bankrupt. } In Bankruptcy
No. 53229

At Chicago, in said District and Division, before the Hon. Carl R. Chindblom, Referee in Bankruptcy, this 29th day of April, A. D. 1935.

A Wage Claim filed and allowed in said cause, with second and final dividend at the rate of 25% declared thereon March 7th, A. D. 1935, by the Hon. Carl R. Chindblom, Referee in Bankruptcy:

No.	Creditor	Amount	Dividend
11	Emanuel Trauske, 6430 W. 26th St., Berwyn, Ill.	$ 80.60	$ 20.15
		$ 80.60	$ 20.15

CARL R. CHINDBLOM,
Referee in Bankruptcy.

282 Mr. Moses: May I be heard on the matter, if the Court please.

The Court: No, the right of the trustee or receiver to be reimbursed for personal advances is quite different from the right to borrow money on his personal credit in order to assist him to finance that business. The Court has indicated this can not be done by the trustee and cannot be done by the bank.

Mr. Moses: That is not the issue in this case, I submit. The issue is Mr. Howard's good faith in borrowing money from the bank.

The Court: No.

Mr. Moses: The contention is going to be made here that there was something that induced Mr. Howard's arrangement in this matter with the Phillip Bank and that was the purpose of making the loan.

The Court: I indicated yesterday, and I will say it again, that personal loans made by Mr. Howard from the bank

and testified to yesterday, simply could not be made for the considerations that were then given.

Mr. Moses: We except to the remarks of the Court on the subject.

Q. Can you tell us approximately what the report shows that you prepared in June 1931 as to the funds that you had on hand in the depository Phillip State Bank and Trust Company?

Objected to by the Plaintiffs as an attempt to reconstruct a report and because the question according to the Court's ruling is whether reports were made or whether they were not made.

Mr. Moses: The purpose of this testimony is to show what Miss Ann wrote down in the report of June 30th as of June the 30th.

The Court: She testified to that. The witness testifies she prepared it, she made it up.

Mr. Heth: Not as to the contents of them.

The Court: The exact contents of them is not material. Objection sustained.

283 Thereupon the defendants offered to prove by this witness that as of June 30, 1931, she prepared a report on which report she put the figures namely $300,000.00, being the total amount of moneys on deposit in the Phillip State Bank and Trust Company, a depository of the Court, as of June 30th, 1931.

Objection by the Plaintiff. Sustained. Exception taken and allowed.

Mr. Heth: The report would be admissible in evidence, and the report would show the total amount Mr. Howard had on deposit. The court has heard evidence to show the loss of the original report. Now, when you are introducing secondary evidence to show the contents of the document that is lost, where there is no duplicate of it, the only way that you can show what was in the report is to have someone testify what they saw in it.

The Court: He is introducing here certain machine tapes.

Mr. Heth: Only as to two.

The Court: They are in evidence.

Mr. Heth: Not as of June 30, 1931.

The Court: I understand that. That was January and March.

Mr. Moses: We have not the tapes for June 30th.

The Court: I understand.

Mr. Moses: The only way we can show the contents of the report is by this girl who prepared them by her
284 recollection of the amount. That is the best secondary evidence we can offer.

The Court: The ruling will be adhered to.

Exception by the defendants.

Thereupon the defendants offered to show by the witness that the amount shown on those tapes aggregate about $250,000.00.

The Court: I say again the ruling will be adhered to.

The Witness: I have a recollection of the contents of the report that I prepared for Mr. Howard sometime in the early part of October showing the bank balances as of September 30, 1931, and written on that report is the bank balance in the Phillip State Bank and Trust Company as of September 30, 1931, and to the best of my recollection it was approximately $250,000.00. I have a recollection as to the contents of the report that I prepared for Mr. Howard with respect to the balance in the Phillip State Bank as of June 30, 1931, and my recollection is that this report showed he had on deposit in the bank on that date approximately $300,000.00.

Thereupon the defendants offered to prove that of the total amount of advances by Sam Howard to the various estates in bankruptcy as shown by defendants' exhibit No. 7 for identification none of said advances has ever been repaid by the estate to him and that they are still outstanding and owing him by the estate.

Objection by plaintiffs. Objection sustained. Exception by defendants taken and allowed.

Thereupon a document being a tabulation made by the
285 witness of advances made by Howard personally, in estates, the funds of which are tied up in this bank but which are not involved in this present litigation showing the aggregate amount of money advanced by him out of funds on deposit in the Phillip State Bank and Trust Company, the names of estates, the amounts of the receiver's cash advances and the trustee's cash advances made out of the bank account of the Phillip State Bank and Trust Company, was marked Defendants' Exhibit number 13 for identification.

Thereupon DEFENDANTS' EXHIBIT NUMBER 13 for identification was offered in evidence by the Defendants and the Defendants offered to prove by the witness that the advances as set out therein were made and that the total amount of cash so advanced, namely $2,728.40, has not been repaid to Mr. Howard.

Objection by the Plaintiffs because immaterial. Objection sustained. Exception taken and allowed.

Defendants' Exception number 13 for identification so offered is in the following words and figures to-wit:

286 DEFENDANTS' EXHIBIT NO. 13.

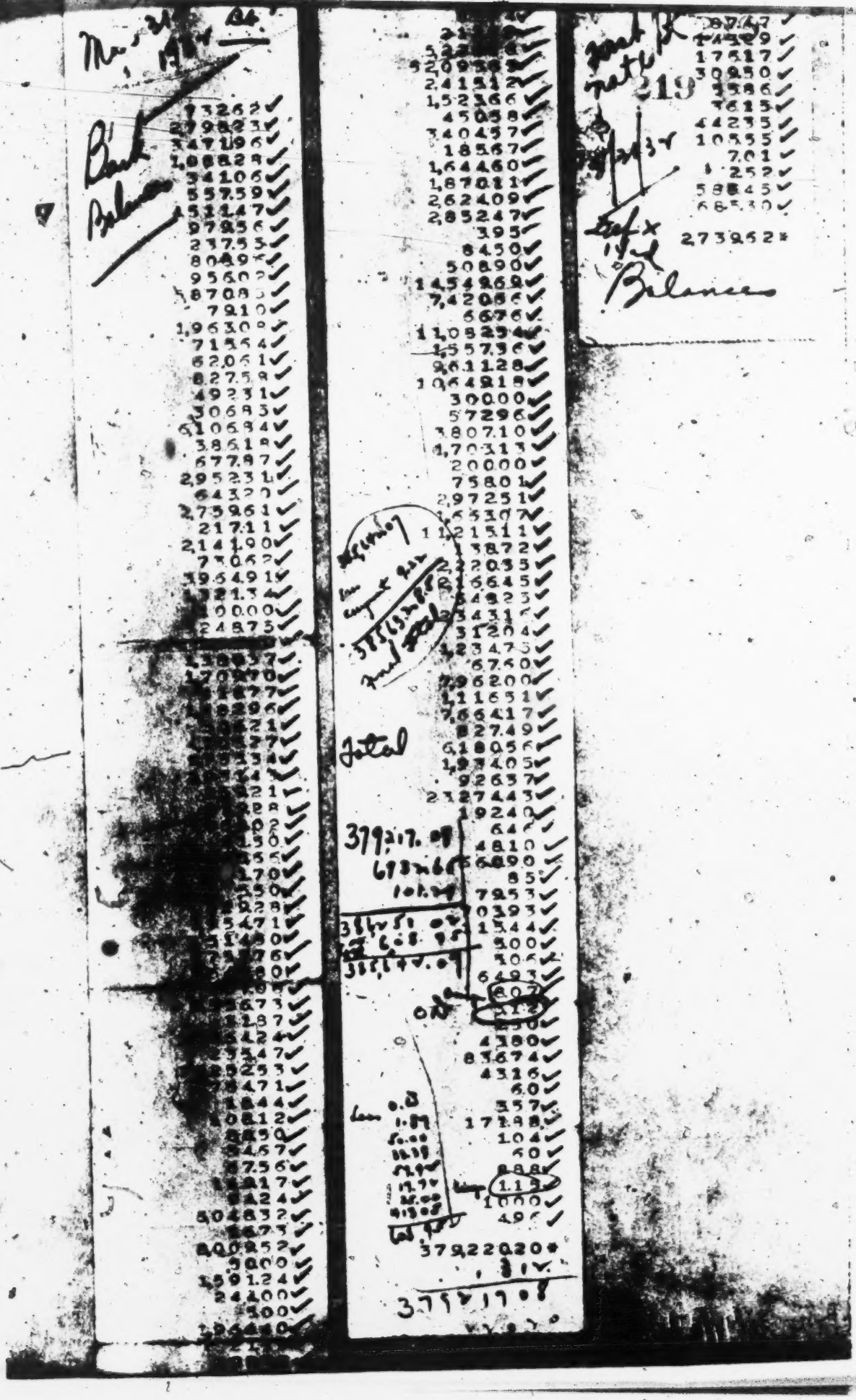
Cash Advances Made by Sam Howard Personally in Estates Tied Up in the Phillip State Bank & Trust Company (Not Involved in Suit) For Which He Has Never Been Reimbursed:

Re: Leo Bunion, Bankrupt.	
Receiver's Cash Advances	$49.23
Trustee's Cash Advances	17.65
Re: Hull & Company, Bankrupt.	
Receiver's Cash Advances	101.52
Trustee's Cash Advances	5.35
Re: Joliet Hardware Company, Bankrupt.	
Receiver's Cash Advances	317.20
Trustee's Cash Advances	22.15
Re: Thomas Engineering & Mfg. Co., Bankrupt.	
Balance Receiver's Cash Advances	49.57
Balance Trustee's Cash Advances	77.73
Re: Universal Wireless Communication Co., Bankrupt.	
Balance due Receiver for cash advances	703.93
(note: this exact amount is tied up in the Phillip State Bank.	
Re: Art Lamp Mfg. Co., Bankrupt.	
(Composition settlement approved by Court	
Receiver's Cash Advances as allowed by Court	886.00
Trustee's Cash Advances as allowed by Court	548.07
Total Cash Advances	$2778.40

287 Thereupon two adding machine tapes about which the witness had testified were marked for identification as Defendants' Exhibits numbers 14 and 15 and were thereupon offered in evidence each separately as DEFENDANTS' EXHIBITS 14 AND 15.

Objection by the Plaintiffs because not sufficient foundation laid and no evidence of anything. Objection overruled and exceptions taken.

Said documents so received in evidence separately as DEFENDANTS' EXHIBITS 14 AND 15 respectively are in the following words and figures to-wit:



	61.50	19240	
	21.90	45401	
	22828	61.3109	
	394234	619837	
	31450	1,93186	
	475178	827.49	
	207.08	7,80265	
	686684	1,60388	
	33547	9,82481	
	64214	1,23429	
	44657	31204	
	24613	272093	
	8850	216374	
	496	45059.	
	1000	379143	
	7733	19357	
	60	1,64315	
	1,18178	711024	
	17188	45950	
	191	64132	
	65298	709207	
	46	340475	
	8000	6676	
	33557	80316	
	122		
	4316	57296	
	83674	448	
	4380	1,69479	
	27336	95808	
	264	6977	
	49294	82330	
	21458	2,21740	
	6493	23636	
	506	5756	
	70393	69540	
	7953	1,69288	
	315378	19833	
	2022	1017442	
	66090	5000	
	61475		
	298537		
	8489		

	187.47
	29002
	1,97482
	24302
	17517-
	30850-
	3586-
	3613.
	44235-
	10458-
	701-
	252-
	643
	38530-
	1,617.88
	280312
	24400
	28459
	19877
	60250
	21259
	308916
	1,83068
	241174
	32697.11
	1709.47
	101.29

290 The Witness: I am familiar with the accounts kept by Mr. Howard in the Phillip State Bank and Trust Company. I am familiar with his individual accounts kept there. He had two of these accounts. They were designated as "Sam Howard" and "Sam Howard special account". In the "Sam Howard special account" he would deposit checks that he received in payment of his commissions as receiver or trustee for the estates he administered and in the Sam Howard general account or what we called the office account he would deposit checks he received from the Court as reimbursement for the cash advances that he had made in the estates that he handled.

Objection by the Plaintiffs as immaterial where he received the money from. Objection overruled. Exception taken and allowed.

The Witness: The money that Mr. Howard borrowed from the Phillip State Bank and Trust Company was deposited into the Sam Howard general or office account which is known as just the Sam Howard account. It is shown on schedule 4 of Plaintiffs' Exhibit number 5. I am familiar with the loans made by the Phillip State Bank to Mr. Howard. The first loan was made I believe the sixth of August 1930 and was for five thousand dollars. The money from that loan was deposited in the Sam Howard special account because at that time we had no other account at the Phillip State Bank. The general office account was opened about September 1930. The next loan I believe was around the 19th or 20th of August, 1930, for six thousand dollars and that was also put into Sam Howard's special account. There was a loan made in September of 1930. I do not remember the exact date.

291 Thereupon for the purpose of showing that seven thousand dollars of the loans made by the Phillip State Bank to Sam Howard and deposited in his special account was paid to the Foreman National Bank and for the purpose of showing that twenty-five hundred dollars of the loan made by Phillip State Bank to Sam Howard and deposited in his special account was paid to the Central Trust Company, a check in the sum of seven thousand dollars dated August 16, 1930, drawn on Sam Howard's special account and payable to the Foreman State Bank and Trust Company and a check in the sum of twenty-five hundred dollars drawn on said special account payable to the Central Trust Company were offered in

evidence separately as DEFENDANTS' EXHIBITS NUMBERS 16 and 17 and received in evidence as such, said documents so received being in words and figures as follows, to-wit:

CHICAGO, ILL., Aug 5 1930 No. 4

[redacted]

PAY TO THE ORDER OF Central Trust Company 2500 00

Twenty five hundred dollars DOLLARS

SAFE DEPOSIT VAULTS Edith Howard

Special

CHICAGO, ILL., Aug 16 1930 No. 9

[redacted]

PAY TO THE ORDER OF Foreman State Nat'l Bank $7000 00

DEPOSIT TELLER AUG 18 1930 CHICAGO

Seven thousand dollars DOLLARS

SAFE DEPOSIT VAULTS Edith Howard

Special

294 Mr. Moses: Of course, I cannot tell what is open to controversy, Judge.

The Court: But it is conceded that that was the purpose. It was part of the arrangement for opening the account in the Phillip State Bank, it was part of the arrangement that the Phillip State Bank would grant him the credit and take up the obligations owing to either Foreman or Central.

Mr. Moses: Q. Now, in connection with the money that you owed the Foreman bank—

295 The Court: I think Mr. Moses it is entirely immaterial as to what Mr. Howard may have done with this money.

Mr. Beebe: I am not objecting to it.

The Court: The point is they were personal loans.

Mr. Moses: Our theory differs from your Honor's ruling. I will preserve my record on it.

The Court: I think it is immaterial.

Witness: The seven thousand dollars that was borrowed from the Foreman State National Bank and that was repaid by Defendants' Exhibit number 16 being a check for seven thousand dollars on Sam Howard's special account in the Phillip State Bank was used by Mr. Howard for cash advances made to different individuals for services they performed in the administration of estates which Mr. Howard handled as receiver or trustee.

Motion by the Plaintiffs to strike as not being material. Motion sustained. Exception by the Defendants taken and allowed.

Thereupon the Defendants offered to prove that the money borrowed from the Foreman State National Bank and repaid by the seven thousand dollar check, Defendants' Exhibit 16, was used by Mr. Howard for the purpose of making cash advances to the various estates for which he was then trustee or receiver in bankruptcy and for the larger part of which advances he was afterwards reimbursed under order of the Court.

Objection by the Plaintiffs as immaterial. Objection sustained. Exception by the Defendants taken and allowed.

Q. For what purpose was the money used which you
296 borrowed from the Central Trust Company for which the twenty-five hundred dollar check, Defendants Exhibit 17, was afterwards given in payment?

Same objection by the Defendants. Objection sustained. Exception taken and allowed.

Same offer to prove purpose for which loan was obtained from Central Trust Company for which twenty-five hundred dollar check, Defendants' Exhibit 17, was issued.

Same objection to offer. Objection sustained. Exception for the Defendants taken and allowed.

Witness: Frequently the account known as the Sam Howard office account would be low and overdrawn and I would draw a check against the Sam Howard special account and put it into the office account in order to meet the expenditures of the administration of these estates.

Motion of the Plaintiffs to strike because not material. Motion sustained. Exception for the Defendants taken and allowed.

Thereupon there was marked for identification as Defendants' Exhibit number 18 a transfer slip for the withdrawal of six hundred dollars from Sam Howard's special account to Sam Howard's office account.

The Court: It strikes me and I tried to indicate this morning that the manner in which Mr. Howard performed his trusteeships in the various matters is not pertinent in this case and I do not believe it is questioned.

Mr. Beebe: Not at all. That is the only reason I am objecting. It is entirely immaterial.

297 Mr. Moses: The only purpose for offering any evidence in the case of personal bank accounts is I believe to argue to this jury that there was some particular privilege or benefit that Mr. Howard obtained by borrowing the money from the bank and that is the reason he deposited the money in the Phillip State Bank and Trust Company. Now the purpose of this proof shows the motives were perfectly honest. I agree with your Honor that his motives of doing business are not in issue in this case at all; but the argument that Counsel will make I believe, because he has put it in his declaration, is that one of the benefits that accrued to Mr. Howard, and the reason that he left all of the money in the bank was that he was getting a particular benefit by leaving the money in the bank. The purpose of this proof is to show that he did not get one cent of benefit out of it. On the contrary he used his own money for the purpose of financing these estates.

The Court: The ruling will be adhered to.

Thereupon the Defendants offered in evidence as DEFENDANTS' EXHIBITS 18, 19, 20, 21, 22 and 23 certain with-

drawal slips showing withdrawals of various sums from Sam Howard's special account to Sam Howard's office account and as DEFENDANTS' EXHIBITS NUMBER 24, 25, 26, 27, 28 and 29 certain checks drawn against Sam Howard's special account and in favor of his office or general account, to which offer and each of them the Plaintiffs objected for the reasons as hereinbefore stated which objection the Court sustained, to which ruling of the Court the Defendants excepted which exception was allowed. Said documents offered in evidence
298 and refused as DEFENDANTS' EXHIBITS NUMBERS 18 to 29 inclusive are in words and figures as follows:

Def + 21 nd

Foreman-State National Bank
CHICAGO

9. 4 1930

Charge Sam Howard Special

Funds Dep $ 200 00

Def + 21 nd

Foreman-State National Bank
CHICAGO

9-30-1930

Charge Sam Howard Special

Funds Dep $ 150 00

Def + 18 nd

Foreman-State National Bank
CHICAGO

AUG 14 1930 19

Charge Sam Howard Special

transfered to Sam Howard $ 600 00

Def + 15 nd

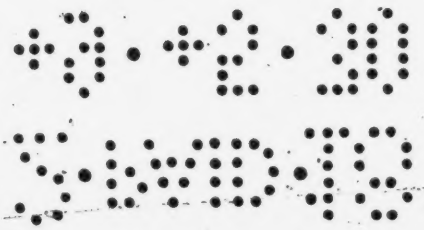
Foreman-State National Bank
CHICAGO

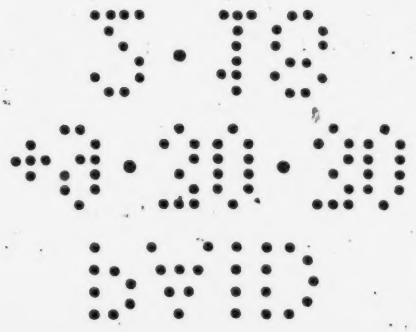
AUG 15 1930 19

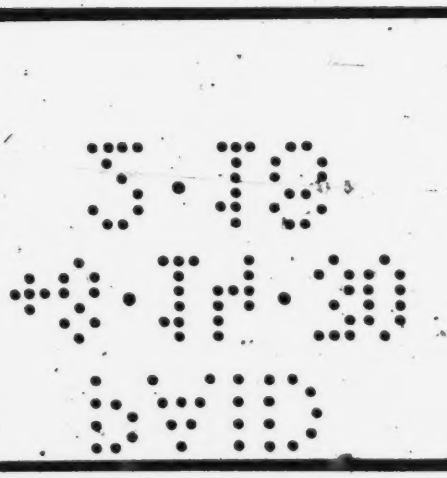
Charge Sam Howard Special

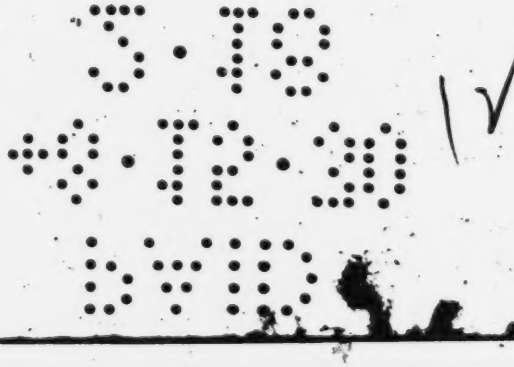
Transfered to Sam Howard $ 100 00

18


9-12-30
S.W.D.


S.D.
9-30-30
B.W.D.


S.D.
9-IH-30
B.W.D.


S.D.
9-12-30
B.W.D.

Foreman-State National Bank
CHICAGO

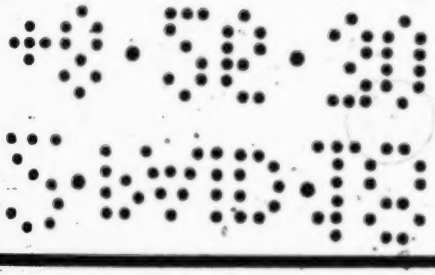
Charge Sam Navarro Special

Funds Personal Ck — Ck 50.00
Per Blank

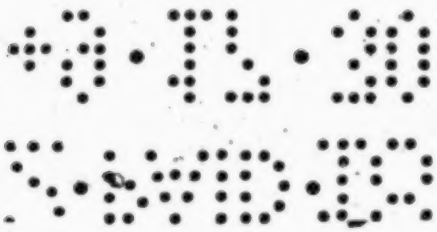
Foreman-State National Bank
CHICAGO

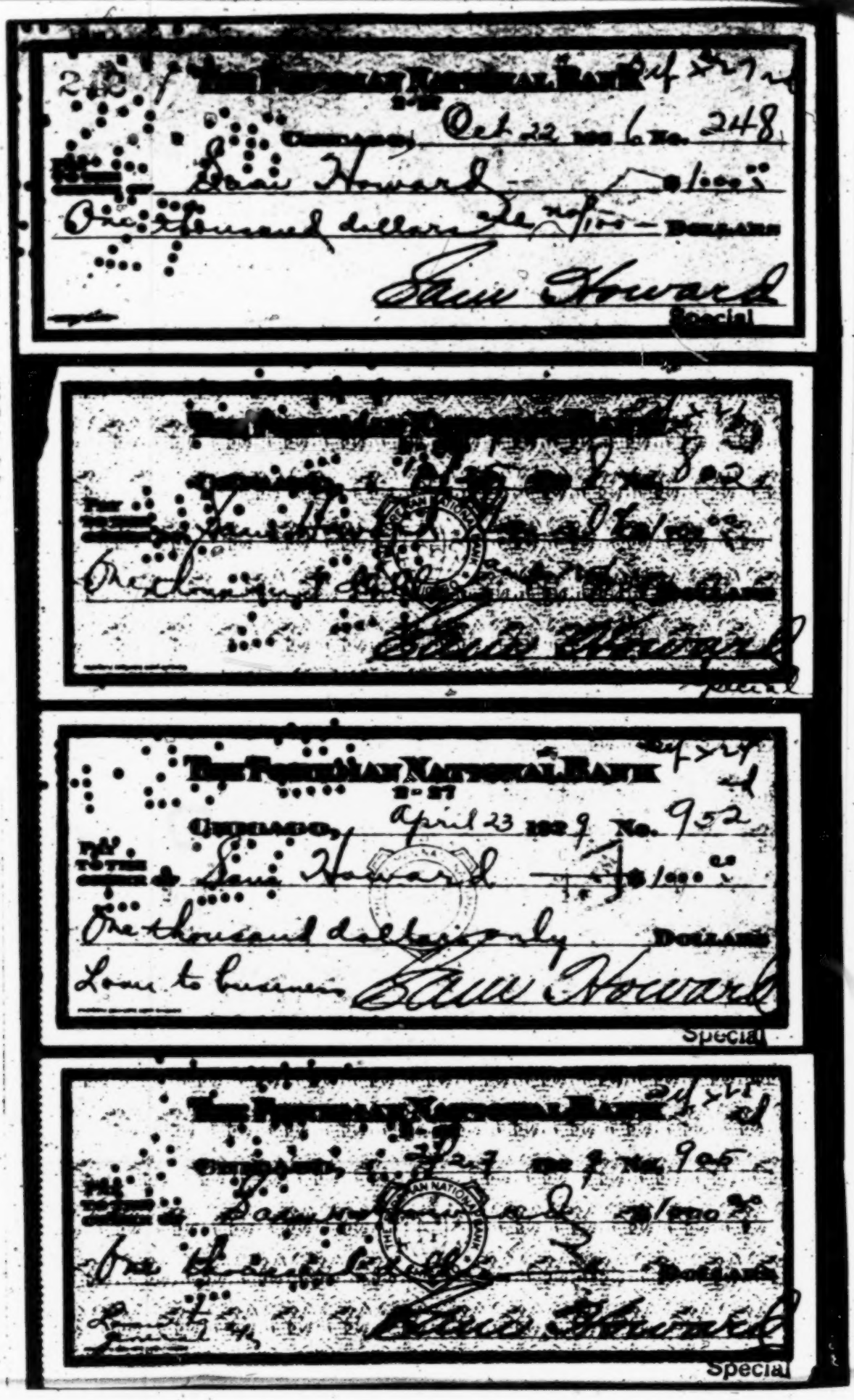
Charge Sam Navarro Special

Funds Ck Sam Navarro 75.00
Ck



14





Oct 22 1928 No. 248

Lou Howard

One thousand dollars No/100

Lou Howard

Special

April 23 1929 No. 952

Lou Howard

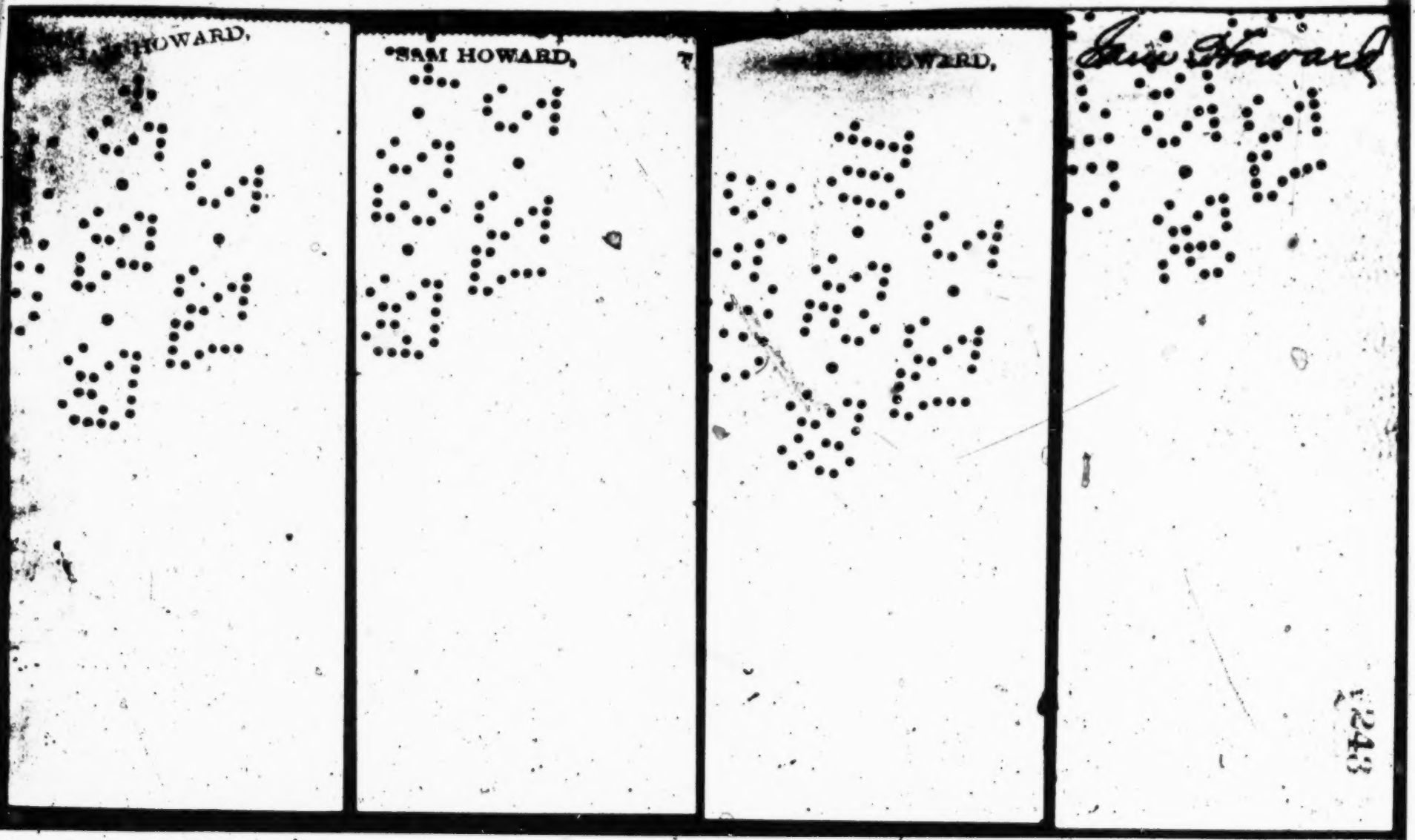
One thousand dollars only

Loan to business

Lou Howard

Special

Special


SAM HOWARD,
SAM HOWARD,
Sam Howard
243

246

Chicago, Apr 7 1930 No. 1166

Foreman-State National Bank 2-16

Pay to the order of Sara Howard Trust account 2000.00

Two thousand dollars —— Dollars

Dan Howard

Special

CHICAGO, ILL., Apr 24 1930 No. 1

2-116 Phillip State Bank & Trust Co. 2-116

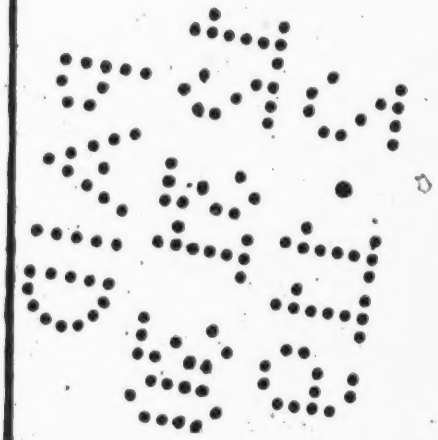
PAY TO THE ORDER OF Dan Howard Trustee $500.00

Five hundred dollars Trustee —— DOLLARS

Loan to General Dan Howard

SAFE DEPOSIT VAULTS

SAM HOWARD,



SAM HOWARD.



307 Witness: With respect to some of these loans, before they were made I had talked with Mr. Michael J. Long, vice-president of the Phillip State Bank. I had a talk in February 1931 and a second talk in May of 1931. Mr. Long called me on the telephone and said that he had an overdraft in the Sam Howard office account and wanted to know what we could do about it. I told him that we were not able to take care of it at that time and he called me a few days later and made a suggestion that we sign a note for the amount of the overdraft which we did and the note was credited to Mr. Howard's account in February 1931. I believe the amount of the note was fifteen hundred dollars. The second talk in May 1931 Mr. Long called me on the telephone and reminded me that we had an overdraft in the Sam Howard office account and suggested that we handle it as we handled the February 5th note and the bank prepared the note and sent it over and I took it in to Mr. Howard and he signed it.

Referring to schedule number 7 Plaintiffs' Exhibit 10 in the audit that has just been made and offered in this case, under an item under date of February 8, 1932, that refers to an estate known as the Art Lamp Manufacturing Company in which Mr. Howard was appointed Receiver and as receiver operated that business, and we needed working capital so five thousand dollars was borrowed from the Phillip State Bank on receiver's certificates.

Mr. Moses: I desire to offer it in evidence.

Mr. Walter Beebe: I would like a little more explanation before that is done.

Mr. Moses: Yes.

Mr. Walter Beebe: I think that is in that particular 308 statement shown as those which are—where Sam Howard was secondarily liable.

The Court: Yes.

Mr. Moses: There is no endorsement on the certificate and he is not secondarily liable. That is the purpose of the proof.

The Court: I am assuming when that receiver's certificate came in there they treated Howard as being in some way liable on it.

Mr. Walter Beebe: Yes, and put it in the book in that way.

Mr. Moses: That is the reason I am offering that evidence, to show that it is incorrect.

Mr. Walter Beebe: I have no objection to it.

The Court: No, there cannot be any objection to that.

Thereupon this receiver's certificate was marked for identification as an exhibit of the Defendants and was offered and received in evidence as DEFENDANTS' EXHIBIT NUMBER 30 and is in words and figures as follows:

309 DEFENDANTS' EXHIBIT 30.

In the matter of
Art Lamp Manufacturing Co.,
a corporation,
Bankrupt
Bankruptcy No. 49,133.

Receiver's Certificate.

Know All Men By These Presents, that the undersigned, Sam Howard, as Receiver of the Art Lamp Manufacturing Co., Bankrupt, acknowledges himself to owe, as such Receiver, (but not personally), and as such Receiver, for value received, hereby promises to pay to bearer, on or before ninety (90) days from the date hereof, the sum of Five Thousand ($5000.00) Dollars together with interest thereon from the date hereof until paid, at rate of six per-cent (6%) per annum, on presentation and surrender of this certificate.

Both principal and interest of this certificate are hereby made payable at the Phillip State Bank & Trust Company of Chicago.

This certificate is issued pursuant to an order of the District Court of the United States in and for the Northern District of Illinois, made and entered on the 5th day of February, A. D. 1932, in the above entitled cause, for the purpose of providing said Receiver with funds necessary to pay indebtedness incurred and to be incurred by said Receiver in the operation of the business of said Art Lamp Manufacturing Co., Bankrupt, and in the administration of said estate, pursuant to orders of said Court, and for necessary expenditures of said Receiver, and in that behalf authorizing the undersigned to issue his Receiver's Certificate in the sum of Five Thousand ($5000.00) Dollars. This certificate, issued by the undersigned as Receiver pursuant to said order, is, by said order, made a first and prior lien and charge upon all of the property of said Art Lamp Manufacturing Co., Bankrupt, of every kind, nature and description now in the possession, of said Receiver, and the proceeds and avails thereof.

In Testimony Whereof, the undersigned as such Receiver has hereunto set his hand this 5th day of February, A. D. 1932.

SAM HOWARD,
Receiver of the Estate of Art Lamp Manufacturing Co., Bankrupt.

(Stamp) Phillip State Bank & Trust Co. Paid May 5 1932. Teller.

310 The Court: I think someone might raise the question as to how equitably the bank reasoned when they regarded Mr. Howard as being secondarily liable on the receiver's certificate, and that is apparently what it is.

The Witness: Referring to the three items of March 9, 1931, on said schedule 7 of Exhibit number 10, Froemling and Heppe, they were notes. Mr. Howard was the receiver for the estate of Froemling and Heppe and was operating it and in the course of operations of Picolo Pete owed the estate money for which he gave four notes and those were notes that were submitted to the bank for collection.

Mr. Howard has not been paid fees or commissions prescribed by law in any of the estate listed on the schedule number 7 for identification.

On Plaintiffs' motion answer that Mr. Howard has not been paid fees or commission stricken. Exception by the Defendants taken and allowed. Thereupon Defendants offered to prove that Mr. Howard has not been paid commissions or compensation in those estates.

Plaintiffs objected to the offer because immaterial. Objection sustained. Exception taken and allowed.

Q. What, in the ordinary course of business, was the time that would elapse between the time that advances were made by Mr. Howard to his estates and the time he would ultimately receive the reimbursement for those expenses from the Court.

Objection by the Plaintiffs as immaterial. Sustained. Exception taken and allowed. Offered by the Defendant to prove that it averaged between eight months and two years. Same objection. Objection sustained. Exception taken and allowed.

311 Q. What, in the course of the business conducted by Sam Howard, was the money in the general office account on deposit with the Phillip State Bank and Trust Company used for?

Objection by the Plaintiff as not material. Objection

sustained. Exception taken and allowed. Offer by the Defendants to prove that it was used for the purpose of making cash advances to the estates in the way as indicated in prior offer. Same objection. Sustained. Exceptions taken and allowed.

On cross examination by Mr. Beebe Defendants' witness ANNE C. PACHUCKE testified as follows:

Yes, this is my writing on this envelope and on these tapes. Yes, I had other tapes in the basket in which these were found but they had nothing to do with this. I could find no other tapes pertaining to tabulation I made regarding bank balances. I could find no carbons. To the best of my recollection I made one carbon and the original of the letters that I placed on Mr. Howard's desk. I did not tabulate our bank balances every month. No one tabulated the bank balances every month. I had an idea of what was in each estate that we were handling as receiver or trustee at the end of each month but I did not tabulate the bank balances every month and this applies to the entire period except on the quarterly proposition between August 1930 and June 21, 1932. No, I did not tabulate balances at the end of the month except as to the particular quarterly ones those on the two tapes, I made the tabulation every three months, yes.

EDWARD A. GLAESER, called as a witness on behalf of the Defendants having been first duly sworn testified on
312 direct examination by Mr. Moses as follows:

I am a lawyer, was admitted to the Bar in June 1934, in the State of Illinois. I attended Loyola University and Chicago Law School. I was in the Chicago Law School three years and in Loyola University two. I know Sam Howard, was employed by him beginning September, 1930, until I was admitted to the Bar in 1934. I assisted Mr. Howard in general administrative duties in connection with his estates and would take possession of cases assisting in the preparation of inventory, operation of the business by the receiver or trustee, preparing petitions pertaining to the various estates, drafting orders, handling all of the filing, or most of the filing, with the Clerk of the Court, following the Court procedure, assisting in the office work and other general duties in connection with these estates. I am familiar with the entry of an

order in the early part of June by Judge Carpenter with respect to making reports. I assisted in the preparation of two of these reports that I recall definitely. They were the reports submitted in the early part of January, 1932, as of December 30, 1931, and the report issued in April as of March 31st. I assisted in the tabulation of these reports by operating the adding machine while Mr. Howard's secretary read the amounts off in the statements. After those reports were prepared and signed by Mr. Howard, I took them and delivered them to Mr. Joseph Muir in the Clerk's Office.

Objection by the Plaintiffs as immaterial and not the best evidence. Objection overruled. Exception taken and allowed.

On cross examination by Mr. Beebe Defendants' witness
313 EDWARD A. GLAESER testified as follows:

Yes, I remember that I did assist twice. I do not remember assisting the young lady at any time in preparing bank balances in gross at any other times. I am pretty sure that I did not assist at any other times in so far as preparation of these tabulations were concerned except these two times.

SAM HOWARD one of the Defendants herein and called as a witness on behalf of the Defendants having been previously sworn testified on direct examination by Mr. Moses as follows:

I am 47 years old and have resided in Chicago about 23 years. I have been acting as receiver and trustee in bankruptcy in this District since November, 1925. Prior to that time I was employed in the Office of the United States Marshal at Chicago. I came into that office as a deputy and was later promoted to Chief Clerk in the office and at a later date was made Chief Deputy United States Marshal for this District which position I held for about five years. In November 1925 the Judges of the District Court here commenced to appoint me receiver and trustee in bankruptcy and continued up to the time of my resignation in these cases, continually since that time. My office while acting as receiver and trustee in bankruptcy was 134 South LaSalle Street, Chicago. During 1930, 1931 and 1932 the principal employes I had in my office were Anne C. Pachucke, Mr. Edward Glaeser, Mr. John T. Brad-

ford, and from time to time I would be obliged to put in an extra stenographer when work was heavy in addition to such custodian and inventory people as I would employ from time to time. Yes, I am still acting as receiver and trustee in bankruptcy in this District,

314 Q. Have you received appointments as such receiver since the resignation which you put in in these cases?

Objection by Plaintiffs as immaterial. Objection sustained. Exception taken and allowed.

Plaintiffs offer to prove that witness is still being appointed receiver and trustee.

Witness: There was a general uniform and well known custom among trustees and receivers in bankruptcy to make advancements to the estate in bankruptcy for which they were such receivers and trustees.

Objection by the Plaintiffs as immaterial. Objection sustained. Exception by the Defendants taken and allowed.

Plaintiffs offered to prove by the witness that there was such a custom during the period 1930, 1931, 1932, thereafter and before, that was general, uniform and well-known among trustees and receivers in bankruptcy to make advancements to estates in bankruptcy out of their own individual funds and that they were later reimbursed therefor by the Courts and that such advancements were made from time to time by the Defendant Sam Howard in the estates where he was acting as receiver and trustee.

To which offer the Plaintiffs objected as being immaterial, which objection the Court sustained, to which ruling the Defendants took an exception which was allowed.

Thereupon the Defendants offered to prove by this witness that he made such advances and had the vouchers, voucher checks, and receipts for cash showing the same, and offered to introduce the same and offered to prove by the witness the same matters and things as offered to be proven by the witness Miss Anne Pachucke with respect to how

315 such advancements were made and reimbursements therefor paid, and with respect to how long it was after such advances were made before they were paid, and with respect to how long after Defendant Howard rendered his services as trustee and receiver in estates before he was paid his fees and commissions.

To all of which offer the Plaintiffs objected as being

immaterial, which objection the Court sustained, to which ruling the Defendants excepted, which exception was allowed.

Witness: I know Mr. Beutel and have known him for about eight years. I had a talk with Mr. Beutel in connection with solicitation by him from me to make deposits in the Central Trust Company of Illinois. I should say this was late in 1928 or early in 1929 in my office, Mr. Beutel and myself being present.

Q. What did he say to you and what did you say to him?

Objections by the Plaintiff as immaterial, as too remote. Objection sustained. Exception taken and allowed.

Thereupon Plaintiffs offered to show by this witness that Mr. Beutel asked Mr. Howard to open a bank account in the Central Trust Company of Illinois for depositing bankruptcy funds and that Mr. Howard stated to Mr. Beutel it became necessary for him from time to time to make advances to these estates and that if he opened an account with the Central Trust Company it would be necessary for him to borrow money to make those advances.

To which offer the Plaintiffs interposed the same objection, and the Court sustained the same and the Defendants excepted, which exception was allowed.

Thereupon the Defendants offered to prove the same by this witness with respect to the conversation between Mr.
316 Beutel and Mr. Howard with reference to the opening of an account in the Central Trust Company that the Defendants offered to prove by witness Beutel.

To which offer the Plaintiffs objected, which objection the Court sustained, to which ruling of the Court the Defendants took an exception which was allowed.

Witness: I recollect a talk with Mr. Beutel with respect to the opening up of a deposit account in the Phillip State Bank and Trust Company. That was late in July of 1930. The first talk was in my office, Mr. Beutel and myself being present. Mr. Beutel came in to see me and said that he was being sent out by the Central Trust Company of Illinois as president of the Phillip State Bank and Trust Company and that inasmuch as I lived on the north side I probably knew the institution. I told him I had known the banking institution for many years. He stated that he had had the matter under consideration for some time and he had not been hasty in making his decision and that after the Central Trust Com-

pany asked him to go out as President of the Phillip State Bank and Trust Company he consulted various prominent bankers in the Loop as to their reaction as to whether it was a bank that would develop, and was a substantial bank, and if it was an advisable move for him to make. Among others he mentioned as having talked with Mr. Melvin H. Traylor, President of the First National Bank. He said Mr. Traylor had told him he thought he would make a grave mistake if he did not take advantage of the opportunity to go to the Phillip State Bank and Trust Company, as it was one of the best banks, if not the best bank, on the North side. I told Mr. Beutel that I would have to consider the matter, and
317 among other things I asked him whether or not the Phillip State Bank and Trust Company was a designated depository of the Court. I told him that it would be out of the question for me to ever consider putting funds in that bank in a bank that was not a designated depository. Mr. Beutel could not answer my question as to whether it was or not but he said he would find out and let me know. He said he was anxious to make a good institution, out of the Phillip State Bank and Trust Company. And I said that may be very true but I have been doing some business with the Central Trust Company of Illinois and I have found my relationship there very satisfactory, to which he replied, "Well, there will be no difference in the bank in which you are doing business whether it is the Phillip State Bank or the Central Trust Company of Illinois, because the Central Trust Company of Illinois controls the Phillip State Bank, and any favors or any considerations which you may have had from the Central Trust Company of Illinois you can get equally as well from the Phillip State Bank and Trust Company because they are one and the same thing." I told Mr. Beutel that I was not in a position to tell him that I would open deposits there until he would let me know about the depository bond and I had had time to think the matter over. At the time I was talking with Mr. Beutel I knew that he had been vice president of the Central Trust Company of Illinois in charge of new business.

Q. Did you have any knowledge as to what extent it was the habit of the Judges of the District Court at that time to appoint the Central Trust Company of Illinois trustee or receiver in bankruptcy in this District Court.

318 Plaintiff objects as being immaterial. Objection sustained. Exceptions taken and allowed.

Thereupon the Defendants offered to prove that for a period of years Judge Landis in this District appointed the Central Trust Company of Illinois receiver and trustee in bankruptcy in this Court and required the giving of a bond of from one dollar to ten dollars and that this was within the knowledge of Mr. Howard at that time.

Objected to by the Plaintiffs as immaterial. Objection sustained. Exception by the Defendants taken and allowed.

I also asked Mr. Beutel at this time whether he was thoroughly familiar with my methods of handling my business and how it was necessary for me to advance funds in the administration of my estates and that I must be assured that the bank—that I am not a man of any means whatsoever, as he knew, and that it would be necessary for me, if I chose to select this bank, to know that I might have accommodations from that bank as far as loans were concerned when I needed them, and Mr. Beutel told me that he was very sure I could have the same accommodations from the Phillip State Bank that I had had from the Central Trust Company and other banks which I had done business with.

Mr. Beutel asked me if I knew the officers of the Central Trust Company, who the officers of the Central Trust Company were, and I had met a number of them and I replied that I did. That was the substance of the conversation. Mr. Beutel said he would ascertain whether or not the Phillip Bank was a depository and get in touch with me shortly again.

Early in August 1930 Mr. Beutel came back to my
319 office and told me that the bank was not a depository and said that he would take the necessary steps to see that the bank was designated a depository and present a motion and have an order entered and I think I said, "It is going to be necessary for me, if I am going to change my bank, banking affiliations, my business is beginning to pick up, and I must have money to take care of the things that are necessary in the administration of my estates that I should like if I am making deposits with him, to liquidate any loans that I may have in other banks and present them all in one." I told him that I expected to go to the Central Trust Company and arrange for such a loan to liquidate the loan that I had at the Foreman National for seven thousand dollars and Mr. Beutel voluntarily said to me, "That will not be necessary. We can make you the loan. The Phillip State could make you the loan could liquidate the Foreman loan and the Central Trust

Company loan as well if you cared to have it done." I told Mr. Beutel that I had a considerable sum of money due me as earnings fees and commissions in the respective estates, as well as large amounts of cash advanced, which would probably not be heard until the following Term when the referees came back from their vacations.

Mr. Beutel said, having been with the Central Trust Company and knowing the knowledge that they have over there of receivership matters, he said "I am firmly aware of just what you have to do. There is no question about that. If you will give me an estimated amount of your fees and commissions the matter can easily be arranged." I then called Miss Anne into my office and asked her to give me an estimate of the cases which were pending and also an approximate figure
320 as to what my earnings were or the money that was due me or the cash advanced in the respective estates, and earnings or commissions which were due me as receiver and trustee. She came back in and gave me such a list with such figures and it amounted to approximately fifteen or sixteen thousand dollars, I cannot recall the exact figure at this time.

The first loan that I made at the Phillip State Bank and Trust Company was on August 6, 1930, for five thousand dollars and I used twenty-five hundred dollars of that amount to pay a loan which I had at the Central Trust Company for twenty-five hundred dollars. The next loan that I made at the Phillip Bank was August 19, 1930, for six thousand dollars and I used this money to liquidate a loan for seven thousand dollars at the Foreman-State National Bank.

Q. For what had you used the money that you borrowed from the Central Trust Company of Illinois and from the Foreman National Bank?

Objection by the Plaintiffs as immaterial. Objection sustained.

Thereupon the Defendants offered to prove by this witness the same character of proof as heretofore offered on this subject, that is that the money borrowed from the Foreman National Bank and the Central Trust Company which was repaid from the proceeds of the loans obtained from the Phillip State Bank was used in making advances for expenses and so forth in various estates wherein Sam Howard was then acting as trustee and receiver in bankruptcy.

Same objection to this offer. Objection sustained. Exception taken and allowed.

Witness: A loan of twenty-five hundred dollars was
321 made to me by the Phillip State Bank in September of 1930 and a loan of fifteen hundred dollars was made in February of 1931 and a loan of twenty-five hundred dollars was made in May of 1931.

Q. What was done with the money which you borrowed on those occasions from the Phillip State Bank and Trust Company, what was it used for?

Objection by the Plaintiff as immaterial. Objection sustained. Exception by the Defendants taken and allowed.

Defendants again offered to prove that the money borrowed from the Phillip State Bank was used in making advancements for expenses and so forth for the various estates in bankruptcy wherein Howard was acting as trustee and receiver.

Witness: Sometime in August I opened an account with the Phillip State Bank and Trust Company subsequent to its designation as a depository. Mr. Beutel called me on the phone and told me that the order had been entered by the Court designating the bank as a depository and afterwards I came to the Federal Clerk's Office and ascertained that the bank had been designated as a depository. I do not remember the exact date of my first deposit. I should say it was probably in August of 1930, after the bank was designated a depository and I think the approximate amount of the deposit was one hundred twenty thousand dollars. I cannot remember whether this deposit, this first deposit was of just one estate or more than one estate.

Early in April 1931 Mr. Beutel called me on the telephone and told me that the Builders and Merchants' Bank, I believe
322 it was, at any rate it was a North side bank not far from the Phillip bank that had closed and he feared there might be some concern on my part and he wanted to reassure me and stated positively for me not to feel the least bit concerned, that they had had a slight run on their bank, a small run on their bank, but nothing about which they had to be disturbed, as the Central Trust Company advanced them all the necessary funds to handle to pay off the depositors. He further stated that he would see me within the next day or two to discuss the matter with me further. A day or two afterwards he called me again and asked if I would have dinner with him and Mr. Rosset. I told him it was agreeable to me and about five o'clock Mr. Beutel and Mr. Rosset picked

me up in my office and we went to a restaurant on the South side to have dinner. During dinner we had a conversation. I asked Mr. Beutel and Mr. Rosset about the run on the bank that Mr. Beutel had called me telling me the Builders bank had closed. Mr. Beutel said that the Central Trust Company had given them all of the money they could possibly need or want to take care and pay off in full the depositors who made their demands. I asked Mr. Beutel if there was a general flury in the neighborhood banks and in the districts among depositors that had money on deposit in the respective banks, having in mind of course, the proximity of the Devon Trust and Savings Bank to the Phillip State Bank. He said they had had quite an extended run in the Devon Trust and Savings Bank, but that the Central Trust Company, in lending their support, not only sent out all the money that they needed to meet the run on the bank, but further the officers and some of
the directors, including Mr. Devall, Mr. Hubbard, Mr.
323 Thayer, of the Central Trust Company, and a number of
other officers and directors came out to the Devon Trust and Savings Bank. I am not sure that he said Hubbard or Bullard. I have in mind Hubbard. I may be mistaken in the name. At any rate he said that one of the officers of the Central Trust Company of Illinois, endeavoring to quiet the depositors in the Devon Trust and Savings Bank mounted a ladder and platform and made a demonstrative speech, in which he held in his hand a copy of the financial statement of the Central Trust Company of Illinois, and said that every dollars of the assets of the Central Trust Company of Illinois, amounting to 168 million dollars were back of the Devon Trust and Savings Bank and the Phillip State Bank. That seemed to satisfy the depositors, so Mr. Beutel said, to some degree and the officers and directors circulated among the depositors on the floor of the banking house, giving out the financial statement of the Central Trust Company and talking to them.

Mr. Beebe: This is at the Devon, I understand?

A. At the Devon. Then, he said, they proceeded—I should say it is about a mile north to the Phillip State Bank on Clark Street, where there were not nearly as many people as at the Devon bank; and that the officers or directors of the Central Trust Company found no occasion to make any speeches to quiet the depositors in that bank but that they quietly circulated on the floor of the banking house and gave out to the people who were in the bank copies of the financial statement

of the Central Trust Company of Illinois at the same time assuring them that they had not any reason for concern, that the Central Trust Company of Illinois would stand right
324 back of the Phillip State Bank.

In this conversation Mr. Beutel and Mr. Rosset stated to me "You have no reason to be concerned at all, the Central Trust Company of Illinois owns the controlling stock of the Phillip State Bank, or holds the controlling stock of the Phillip State Bank." I said to them, "If this was my own money perhaps I would not be so concerned about it, but I am interested in the preservation and taking care of money that belongs to other people." Mr. Beutel said, "You have not any need to worry about that at all. Your money is in the Trust Department of the Bank and there is first-grade collateral dollar for dollar to cover every dime that you have on deposit in this bank." I asked Mr. Beutel or Mr. Rosset, perhaps both of them, "Then there is no reason for me to feel concern? You can show that the bank is absolutely sound." I remember very distinctly the reply I got from Mr. Rosset in which he said, "You know the Central Trust Company of Illinois." I replied that I did. He said, "Well they own our bank so you have nothing to be concerned about. It is absolutely sound."

I had another conversation with these parties in June shortly before the receipt by me of a letter of June the 12th, 1931, identified as Defendants' Exhibit 5, the Clark letter. About this time The First National Bank was taking over the Foreman-National Bank and the Sheridan Trust and Savings Bank, a branch bank of the Foreman-National Bank closed, which was also a North side bank. I called Mr. Beutel on Sunday after the Sheridan Trust Bank closed and asked him what reaction there would be to the closing in so far as
325 the Phillip State Bank was concerned. He said the bank was some distance from the Phillip and notwithstanding it was a North side bank there was no reason to be concerned about it at all, that they did not anticipate any trouble but that if they should have any the Central Trust Company of Illinois had assured them of all the financial support they might have in making any runs on the bank. I told Mr. Beutel that I would feel much better satisfied if I had an opportunity to talk with him personally rather than over the telephone although I called him to ascertain just what the condition was; so later in the day Mr. Beutel called me or Mr. Rosset called me and asked me if I would join Mr. Beutel at his home for

dinner that night. I went to his home for dinner and while there I told Mr. Rosset and Mr. Beutel that it was quite a natural thing when a bank closed on the North side that I should have some interest in knowing what the condition of the Phillip State Bank was and whether or not they were in a position to meet any demands that might be made on them as a result of the other banks closing. Mr. Rosset said to me, "To show you what the banks downtown think of the Phillip, The Central Trust Company have said to us that they would give to us dollar for dollar on the assets of our bank." He further said, and I think it was in this conversation, Mr. Beutel or Mr. Rosset said to me that he contemplated selling the bank to Mr. George Woodruff, who was president of the National Bank of the Republic; that when he spoke to Mr. Thayer about it and the other officers and members of the Central Trust Company of Illinois, they told him not to do it, and that there were not to sell the bank to
326 Mr. Woodruff they wanted to buy the bank because they anticipated the consolidation of several banks on the North side with the Phillip State Bank and Trust Company. They stated that there was not the slightest reason on my part to feel any concern, that my money was in the Trust Department of the bank, it was fully protected, and the bank was absolutely sound. At the same time Mr. Rosset said to me that he had been talking to the officers of the Central Trust Company of Illinois, inasmuch as they were willing to lend their support to the Phillip State Bank and Trust Company to such an unlimited degree, that he had talked to the officers of the Central Trust Company as to getting a letter that might be sent to the depositors which might set at ease any unrest they might feel relative to the closing of the bank. He said he hoped to have that letter within a day or two. Within a day or two the letter came into my office. I read the letter. Shortly afterwards I had occasion to be in the Phillip Bank and I mentioned to Mr. Beutel or Mr. Rosset, I think Mr. Beutel, that I had received a copy of a letter, a photostat of a letter signed Phillip R. Clark president of the Central Trust Company and he asked me whether or not I was satisfied with it. I said I was, that I felt Mr. Clark would not commit himself in writing a letter of that sort unless they meant to live up to just what they said they would do. I noticed at the bank on the main floor an enlarged photostat of Mr. Clark's letter which was framed and sitting on an easel and also

noticed that enlarged photostatic copies of the letter were in windows of the bank.

Of course every time I saw Beutel or Rosset I asked
327 them about the bank. I saw one or either of them almost every week or ten days in my office or at the banking house and it was natural that I would ask them as to the condition of the bank and as to whether their relationship with the Central Trust was still the same and so forth. They always replied the same, that the bank was absolutely sound, no reason for concern on my part. I never learned of any change in the relationship between the Central Trust Company and the Phillip State Bank and Trust Company.

In a conversation that I had either with Mr. Beutel or Rosset or the two of them I think either in the first or second conversation that I had with them I said to them "Why isn't some evidence shown of the relationship between the Central Trust Company of Illinois and the Phillip State Bank and Trust Company?" To which they replied that daily a statement of the bank's condition was sent by messenger to the officers of the Central Trust Company of Illinois; and they further stated to me, as evidenced by printed matter which I had seen, that Eugent V. Thayer of the Central Trust Company of Illinois was chairman of the advisory committee of the Phillip State Bank and Trust Company, together with Mr. Shanahan, Mr. Parenti, Mr. Webb and various other men who were associated in the banking business in Chicago.

I remember a conversation sometime about the 9th of June with Joseph Muir, Chief Deputy Clerk of the District Court of the United States by telephone.

Q. What did Mr. Muir say to you?

Objection by the Plaintiffs. Objection sustained, exception taken and allowed.

328 Thereupon the Defendants offered to prove that Mr. Muir called Mr. Howard on the phone and told Mr. Howard that Judge Carpenter had directed him to require all of the trustees and receivers in bankruptcy to file reports of the amount of money on hand in the depositories and that Mr. Howard should file such a report.

Plaintiffs objected to this offer. Objection sustained. Exceptions taken and allowed.

Q. What did you do after the conversation with Mr. Muir?

Same objection. Same ruling. Exception taken and allowed.

Mr. Moses: I simply want to offer to prove this again.

The Court: You can have the benefit of your offer.

Mr. Moses: We again offer the letter of June 9th.

The Court: Same ruling.

Q. What, if anything, did you do with the letter of June 9th which has been marked for identification as defendants' exhibit one?

Same objection.

The Court: That has been ruled upon.

Thereupon the defendants offered to show that this letter of June 9th was delivered to Mr. Muir.

Objection by plaintiffs, sustained, exception taken and allowed.

Witness: I should say that the first time I was appraised of Judge Carpenter's order of June 11th was on June 12th. It came to me by mail. Later in the month at the close of June the 30th as of July 1, 1931, I directed my office to prepare a statement to be submitted in accordance with that order of the court to be filed by the Court showing the amount
329 of money which I had on hand in the respective depositories. I gave that direction to Miss Anne in my office. She prepared and submitted to me a certain document in the early part of July 1931 showing the total amount I had on deposit in the Phillip State Bank as of June 30, 1931. She brought to my desk a legal-size sheet of paper on the top of which was designated Balances on hand in depositories as of the Close of business June 30th, 1931. There was one sheet of paper. Below that was tabulated the moneys which were on deposit in the respective depositories, the Phillip State Bank and Trust Company, and either the Foreman-State National Bank or The First National Bank, and together with that was a letter of transmittal to Joseph A. Muir, Chief Deputy Clerk of the United States District Court enclosing the report which was to be filed by Mr. Muir.

Objection by the Plaintiffs because no proper foundation laid and not proper method of proving a Court record. Objection overruled. Exception taken and allowed.

Mr. Moses: Will you please mark this document on Sam Howard's letterhead bearing date of February 17, 1933, a second document attached thereto marked "Statement of Sam Howard of balances in the respective depositories as of the close of business January 1, 1933."

(The documents were marked Defendants' Exhibits 31 and 32 for identification.)

Mr. Moses: They are only to show the form if the Court

please, not to show what is contained in the particular documents but the form that was used as of July 1, 1931, and thereafter in the making of those reports.

330 Plaintiffs object on the grounds they are immaterial.

Objections sustained.

Mr. Moses: I am trying to meet Counsel's objection further by showing the exact form of the document, not for the purpose of proving the contents of the one of February 17, 1933, because I realize that has nothing to do with this case but merely to prove the form of the instrument that was prepared by Miss Anne on July 1, 2, 3, 1931. Does your Honor sustain the objection?

The Court: Yes.

Exception taken and allowed.

Witness: After I signed the letter and report made up by Miss Anne showing balances on deposit in the bank as of June the 30th, 1931, I took the letter and report and personally delivered them to Mr. Muir the Chief Deputy Clerk in the Clerk's office on the sixth floor of the United States Court House. That is the last I saw of it. I also delivered to Mr. Muir Chief Deputy Clerk, personally, my report of total deposits in the Phillip State Bank and Trust Company as of September 30, 1931. It was exactly in the same form as the report of deposits as of June 30th, 1931. All the reports were in the same form. I delivered this to Mr. Muir on the sixth floor of the United States Court House in the Clerk's office and that is the last I saw of it. Those are the only reports that I delivered personally other than the letter of June the 9th.

I recall a conversation with either Mr. Beutel or Mr. Rosset sometime in September or October 1931 on the occasion of a run on some other bank, I think it was the Rogers Park National Bank. This conversation was in my office.

331 When I learned that the Rogers Park National Bank had closed I asked Mr. Beutel to come in and see me, as for some reason I could not conveniently go to the bank. He came in as I recall the day following and I asked him what effect the closing of the Rogers Park National Bank would have as far as the Phillip State Bank was concerned. He said it would cause a run, but there was nothing to be concerned about; that as a matter of fact the closing of the Rogers Park National Bank would make them even a stronger bank as they were practically the only bank left in the neighborhood on the North side. He said that in the runs that he

mentioned to me, the run figures, which I do not remember, that they had called on the Central Trust Company as they had done on previous occasion to have the necessary cash in the bank to meet the demands on the depositories and there had been no question at all raised by the Central Trust Company of Illinois in furnishing them any necessary financial help, and I said, "There is no doubt in your mind but what your bank is as safe as it ever was?" He said, "I think it is safer than it ever was."

The various reports that I filed from time to time in accordance with the requirements of the District Court rules in these separate estates, as receiver or trustee in bankruptcy show where I kept my money on deposit and the amounts on deposit and they correctly show the amounts. Those reports were filed usually, the receivers with the Clerk of the United States Court, the trustee with the referee in bankruptcy.

I signed a similar letter of transmittal and a similar report as the one of June 30th for the period ending Sep-
332 tember the 30th and the period ending December 31st and the period ending March 31, 1932. I had no other income from any other source than the money I received from compensation pursuant to the statute as receiver and trustee during this period of time. At the time the bank closed I had funds on deposit in both the special and general accounts and no portion of these have been repaid to me. I did not get any personal benefit of any kind by reason of any loan made to me by the Phillip State Bank and Trust Company.

Objected to by plaintiffs as calling for a conclusion. Objection sustained. Exception taken and allowed.

At the time the Phillip State Bank closed I was on my way to Chicago from Philadelphia. I left Chicago on June 17, 1932.

Q. Do you recall what your mission was there.

Objected to by plaintiffs as immaterial. Objection sustained. Exception taken and allowed.

Defendants offered to prove that he was on a matter relating to receivership of one of these estates.

Objection Sustained. Exception taken and allowed.

333 On cross-examination by Mr. Beebe, the defendant, SAM HOWARD, testified as follows:

Yes, I had a number of discussions with both Mr. Beutel and Mr. Rosset with reference to the condition of the Phillips State Bank. I would not say as often as once a week but in

the course of every ten days or two weeks I would see one of them. I kept in pretty close touch with the situation. I received statements of the bank which were issued quarterly, which I saw. I probably knew what the deposits were in the bank at the time I made the first deposit but I do not remember now. I cannot recall that there were $3,400,000 at that time, I cannot recall the figure of the deposits then. I most certainly did have an interest in the amount of money on deposit. Yes, I looked on $249,000 as a lot of money. I do not recall the exact figure I had on deposit in August, 1930. As to the condition of the bank I did not depend on a report which was issued by the bank as to the stability or soundness of the bank. I was depending upon the statements which were made to me by the officers of the bank who were actively engaged in operating the bank. I could not assume to guess how many accounts there were in which I was receiver or trustee in bankruptcy in August, 1930. I would not have the slightest idea whether it ran up toward 150, I would have to make a compilation. I would not know just how many estates I was handling in April, 1931, it probably was over 100, I should say it was in excess of that, sometimes somewhere between 100 and 200. I did not have an attorney in each of these estates, in many of them I employed no counsel. An attorney was employed in the estates where it was necessary, where some litigation was involved, some questions where a layman was not in a position to properly consider them. I could not say in how many estates I had an attorney between August, 1930, and June 21st, 1932. I would not attempt to say whether it was more than five. Well, in many instances, in some cases I had an attorney.

A. My answer to the question is that I only employed counsel in cases where it demanded some legal work to be done by attorneys.

Mr. Walter Beebe: I move that this answer be stricken and that he be asked to answer the question.

The Court: Strike it out. Answer the question if you can.

Witness: If the Court please, I can't attempt to tell in how many estates I had employed counsel. If Mr. Beebe will be satisfied with the answer, was it more than five, why of course it was more than five.

Mr. Walter Beebe: Q. All right, now was it more than twenty-five?

The Court: You first said you couldn't tell, that is why he is pressing it.

Mr. Walter Beebe: Q. Was it more than twenty-five?
A. It probably was more than twenty-five, Mr. Beebe.
Q. It might even have been a hundred?
A. No. I don't believe it was a hundred. We won't go that high. As to taking up with these attorneys the fact that I had $249,000 deposited in August 1930 on a $50,000 bond and at the same time an $11,000 personal loan, my answer is that as far as the attorneys who represented me in the various matters, every attorney would receive from me an exhibit showing where the money was deposited. I think, without exception, the attorneys who handled any matters for me knew that the Phillips Bank and Trust Company was a depository used by me.

334 On motion of plaintiff, defendant's answer to the question was stricken. The defendants objected to this, which objection was overruled and exception taken and allowed to the court's action in overruling the objection and in striking the witness' answer.

Witness: No, I did not take up with these attorneys the fact that I had deposited $249,000.00 during August, 1930, on a $50,000.00 bond and had at the same time secured an $11,000.00 loan, and I did not take up with them the fact that all of the deposits that I had in there ran between $249,000.00 at the end of August and $416,000.00 on June 21st, 1932, and that I had a personal loan running between $11,000.00 up to $18,050.00 in July, 1931, and down to $17,500.00 at the time the bank closed, and I did not take up with these attorneys the amount of my deposits in gross in the Phillips State Bank and the question of the amount of deposits in the bank decreasing as my deposits increased.

The defendants objected to all of the testimony. Objection overruled. Exception taken and allowed.

Witness: No, I did not know that the Central Trust Company as a bank could not own another bank. No, I did not take that question up with any of the lawyers. I certainly knew that there was no branch banking in the state of Illinois but I must admit that I did not know that a bank in Illinois could not own another bank. No, I did not make any inquiries about that. Yes, of course, anything of the character that I have testified to with reference to statements to me by Mr. Beutel or Mr. Rosset that the Central Trust Company owned this bank was taken by me as the gospel truth, I believed it, and when I said that Mr. Rosset told me, after the Clark letter, that the Central Trust Company was talking

about buying the Phillips State Bank when it already owned it, that I presumed Mr. Rosset meant that they were going to buy the stock in full, buy all of the stock of the bank—I knew they would have to buy it as there was more than one stockholder in the bank, undoubtedly. No, I never heard the bank spoken of as one of the Rosset chain, I never heard the expression Rosset chain unfil I heard it in court either yesterday or today. No, I did not know that Mr. Rosset was supposed to have the controlling interest in the Phillips State Bank. He told me he had originally borrowed a substantial sum of money from the Central Trust Company of Illinois and that they were holding the controlling stock in the bank, I do not know whether as collateral to the loan. No, I won't say that I knew that the Central Trust Company did not own this bank.

335 Yes, somebody said they had a small run out at the bank in April, 1931, it was not a disturbing run, perhaps would be a better way to put it. Yes, he said he had borrowed $1,000,000.00 from the Central Trust Company. No, I do not think I would call a run requiring a million dollars a small run in a bank having $3,400,000.00 in deposits.

Q. You said your money was in a trust account. Wasn't it in the ordinary commercial account?

A. I was checking it out, at any rate.

Q. You knew it was in the commercial account, did you not?

A. I knew I was able to check it out but whether I knew it was in the trust account I could not say that. Yes, I knew how it was deposited.

Q. Well, do you know whether it was deposited in a trust account or an ordinary commercial account?

A. I only know what I was told by Mr. Beutel and Mr. Rosset as I have testified. We had a great deal of controversy over that question.

Q. Did you know whether it was deposited in the ordinary commercial account?

A. I must have assumed they were ordinary commercial deposits or else I would not have been able to get them out.

Q. You knew that at that time didn't you?

A. I knew I was checking them out, I was able to draw checks on the account.

Q. Then what did you mean on your direct examination when you said that they were in the trust account secured dollar for dollar?

A. Exactly what I had been told by the officers of the bank. They most certainly told me that the money was in the trust account and secured dollar for dollar. As to knowledge of the amount of the depository bond being only $50,000.00, it was not my business to look after that other than to inquire if the depository bond had been filed. Yes, I think I did know the amount of the bond. I did not examine the records that they had in here on depository bonds.

Q. Why did you say you did on direct examination?

A. I made inquiry of the cashier's office where the record is kept. Yes, I knew that I could find out at any moment what other banks had depository bonds, that they was public information available to me. No, there was not at one 336 time a list of all the banks having depository bonds and the amount thereof turned over to me as trustee and receiver.

Q. What did you assume was meant when you were told that the money was secured dollar for dollar by a trust account?

A. I assumed that a true statement was given me, that the United States securities, bonds and other securities were absolutely safe and protected my money dollar for dollar. No, I did not have them investigated, I do not think I would have the privilege of going into a banking house to investigate it. Yes, I believed I was being told the truth. No, I do not think I would say that if I put $450,000.00 in a bank that had $5.00 in deposits and somebody told me that was secured dollar for dollar that I would assume that was true. I had known Mr. Rosset only since the summer of 1930. I knew Mr. Clark only by sight. Yes, I knew that the business of a banker was to run the bank and that a successful banker had to have deposits. No, I will not admit that much of the conversation with me was business conversation. There is no doubt but that I knew that these men as bankers were interested in having my deposits in their bank and it is quite so that much of the conversation was for the purpose of persuading me to keep my money in the bank. As to the fact of the frequency of these conversations arousing my suspicion in any way I am afraid that I was the one who took the initiative in these conversations. No, I did not take the initiative in the August 30th or July 30th conversations. I thought you were talking about conversations subsequent to my opening the account. Yes, the initiative in the beginning was elsewhere, and as to the initiative in April, 1931,

Mr. Beutel called me, he probably would have heard from me if he hadn't; and as to the initiative being elsewhere in June, 1931, I don't think it was, I think I called Mr. Beutel in that instance. No, the initiative in the September run was not elsewhere, I called Mr. Beutel. No, I cannot say that the initiative in the December run was elsewhere, I do not recall, Mr. Beutel may have called me first. I would not say the very fact that these men called me to tell me that there were runs on the bank would arouse my suspicion as to the question of the condition of the bank, it might arouse some element of unrest as far as I was concerned. As to going into these Exhibits 11 to 18, inclusive, that you have shown me, I never saw these exhibits. I saw the quarterly reports that were sent out, I presume this is a statement of the quarterly reports. I went into these as carefully as any man goes into a bank report or financial statement which to me does not mean much. As to whether I took them to anybody that it did mean something to and had them explain it,

337 I would have to go to a certified public accountant, I am afraid, to really the one who prepared it, to give me the inside facts, just exactly what any bank statement was. As to whether a very considerable reduction in the deposits meant anything, it was noticeable, but I had knowledge before the statement was issued about the withdrawal of about a million dollars in deposits in June 1931.

Q. Well, would the fact for the first time a statement shows $300,000.00 in bills payable, would that mean anything to you?

A. I probably noticed it.

Q. Would a reduction in cash resources of from $538,000.00 to $394,000.00 mean anything to you?

A. Yes, I noticed these various items on the statement.

Q. Did they mean anything to you?

A. I would not say that a financial statement means very much to any man. He gets it in the mail, he looks at them and throws them in the waste basket.

Q. In other words, as receiver or trustee, having charge of trust funds with money deposited in a comparatively small bank, the bank statements meant nothing to you?

A. I would look over a bank statement. I always look over a bank statement and observe the amount of the deposits, the capitalization of the bank, undivided profits, amounts set up as reserves and such other things as ordinarily appear in a bank statement. No, I did not know I

was the largest depositor in the bank, I did not take any means to discover whether I was or not. I could not very well question into that. I knew nothing about what other people had on deposit at the bank, from August 1930 to June 1932.

Q. Did you ever check into to determine the fact that you had anywhere, as to gross deposits, from 7 to 19% of all the deposits in that bank, and that was no interest to you.

A., I would not say that was of no interest to me. I did not check into it to determine whether I had from 14 to 25% of all the individual demand deposits in the bank. Yes, it was a matter of interest to me. I did not know that I had from 28 to 74% of all the cash items in the bank. I did not investigate to determine what percentage the amount of the deposits were as a whole. I did not make any report to the court of the percentage of my deposits to the total amount of money on deposit in the bank, I was not required to make such a report. I did not offer to make such a report. I did not make a report to the court of the gross amount of all of the general deposits of the bank and of a reduction in
338 the general deposits of the bank and of the relationship of the total of all of my deposits to the amounts of the general deposits in the bank. No, I did not make any report to the court that I had a personal loan of from $11,000. to $18,000. in the bank. No, I never told the court or made any report to the court that I put money in the bank on condition that it would pay certain loans to other banks or give me money to pay loans to other banks. No, I didn't tell the court that I was borrowing money at this bank in anticipation of the fees that had not been allowed, not in just that way. Yes, I believed Mr. Rosset and Mr. Beutel, whichever it was, when he told me that all of the banks in the neighborhood having failed it made the Phillips State Bank stronger. Yes, I think I heard that while I was in the east Mr. Pennish had a talk with Mr. Beutel on the Saturday before the bank closed. I would not fix any date because I do not know when it was. He talked with Beutel but when it was I do not know, I was not there. I think I have been present when he talked about it but I cannot fix the date. No, I do not understand that the young lady, Miss Anne, had a talk about changing my funds from the commercial account to the trust account on Monday, I do not understand that she had such a conversation, she can only testify as to what conversation she had.

Q. You have heard her—

A. That is my understanding.

Q. You heard her say that she did, when she was under oath.

A. No, I do not believe that was just exactly—I do not believe that is just exactly what was said to her. I know nothing about a time when there was an effort to make that change on June 21st, 1932, over my signature, except what transpired afterwards, what I heard after I came back from the east. I was then told that a paper for the purpose of transferring these funds from the ordinary commercial account to the trust account in the bank had been waiting for me to be signed for two or three days and I signed it when I returned to Chicago. Yes, I knew at that time that my funds prior to that time had been in a commercial account. I knew a lot of other things just at that time, too. Yes, I got interest on the money that was deposited in these various accounts as long as bankers were paying interest on the respective estates. The amount varied, I think one time it was 2% and then reduced to 1½% and then to 1 and then to ½ of 1%. I cannot say that up almost until the day the bank closed I got interest on these deposits, I do not remember when I received copy of notice from the clearing house stating that interest on the deposits had been discontinued or had been reduced. This interest was credited to these various accounts, I do not know the dates. No the de-
339 posits were not made in the bank with the agreement that there would be interest. It is always understood that a receiver and trustee—

Q. No, I am talking about this particular situation, whether you had an agreement beforehand that there should be interest paid on these accounts.

A. Only such interest as would be paid as was directed by the clearing house association. That is all as far as my understanding is concerned.

Q. Did you have any agreement with either Mr. Rosset or Mr. Beutel that interest would be paid on these balances in these accounts?

A. I do not know just what you mean by having any agreement with them. I did not have to have any agreement. Of course, it was understood that interest would be paid on deposits in excess of $1,000.00, that is, balances in excess of $1,000.00.

Well, it may have happened in some instances that there

were overdrafts in connection with my trustee and receiver accounts, but it was not a common practice. No, I would not say that considering all of these accounts as a whole that the overdrafts during the year 1931 would average approximately $1700.00 per day. If this is so it was without my knowledge and I will not say it because I do not believe it. It seems to me if there were an overdraft, in every instance the bank would send up a notice or call our attention to it, and it would immediately be taken care of. Sometimes the bank carried as an overdraft an account that had not been transferred from the receiver to the trustee, and maybe a check was drawn against the account as trustee. No, I have no recollection in the matter. You have called my attention to a particular overdraft in a particular estate and I would say it was very exceptional. Yes, I would be very much surprised if you brought in a lot more and they all showed the same condition in different accounts. No, I had no agreement with Mr. Beutel or Mr. Rosset or Mr. Long or any of the other officers of the bank that they would protect me on overdrafts in these various accounts. I never asked them to and they never indicated they would. No, I would not say that so long as there was an overdraft that was cleared up the next day or a week or so that so far as I was concerned it was not a matter of any particular comment. I say that an overdraft would be a matter of considerable importance to me when it was called to my attention. Yes, I notice one of these overdrafts you have shown here for $1100.00, of course, I am not permitted to say what I think about it but I can only answer the questions that you ask me, but I would like to tell you what I think about it. Yes, I notice that it was for over $1100.00 but I am not permitted to explain it.

235 Yes, I understand the order of June 11th, 1931, made by Judge Carpenter referred to receivers and I noticed that it did not refer to trustees.

Q. Did you, as trustee or as receiver, at any time file with Judge Carpenter or any other Judge in the District Court of the United States in the Northern District, Eastern Division, in the State of Illinois, any kind of a petition, bill or any other form of paper or document asking the Judge's advice with reference to your dealings with the Phillips State Bank and Trust Company?

Objection by the defendants as being incompetent, ir-

relevant and immaterial and no such duty imposed by law on the witness. Objection overruled, exception taken and allowed.

A. No, I did not.

Yes, I knew that my special account and general office account were in the commercial dealings of the bank and that they were not secured in any way. No, I did not give any security of any character for my loan account.

I carried some of my trustee and receivership accounts in bankruptcy in banks other than the Phillips State Bank and Trust Company; I still have some accounts, carry some accounts in the Foreman Bank, which was transferred to the First National, but I am quite sure that all of the Central Trust Company accounts were liquidated by hearings before the Referee in payment of dividends.

You have called my attention to plaintiff's Exhibit 5. Yes, I notice that starting on August 1930, total deposits in the bank was $3,401,000.00, that in December $3,867,000.00, that in January it goes down to $3,356,000.00, and that in October, 1931, it goes down to $2,243,000.00. Now, you are showing me some figures of your own and I notice that I started out with a total of $249,533.00 in August, 1930, and it went up so that I had $286,109.00 in January, 1931, and then that it goes down in July to $241,477.00, and you ask if there was any occasion for that reduction. The principle reason for that reduction is that one of the largest estates, National Theatres, was partially paid out on orders of the court during that period. I do not remember when I still had $46,000.00 of National Theatres on deposit on June 21st, 1932. It was not all paid out. No, I did not reduce the amount to $241,000.00 at the end of July or August of 1930 because of any fear of the condition of the bank. There is no particular reason for the deposits increasing from
341 June, 1931 to June 21, 1932, until on June 21, 1932, they amounted to $416,000.00 except for the business. Yes I read the letter being defendant's exhibit 5.

Q. Does that letter indicate to you in any way that all the resources of the Central Trust Company are behind the Phillip State Bank?

A. It does not say so.

Q. What does it mean, "consistent with sound banking practice?"

A. Only the writer of the letter could interpret it.

Objections by the defendants, overruled, exception taken and allowed.

Q. Wouldn't you interpret "sound banking practice" as the loaning of funds on good ample security. Isn't that what is considered sound banking practice.

A. Yes, and I have known of a lot of loans where there was no security. The element of confidence entered into it. On motion of the plaintiffs, over the objection of defendants, "the element of confidence entered into it" was stricken from witness' answer. Defendants except.

Redirect Examination by Mr. Moses.

Now in the light of the cross examination as to what Mr. Howard told Judge Carpenter, and that is the language of the question, we offer in evidence the letter of June 9, 1931, being DEFENDANTS' EXHIBIT NO. 1 for identification.

Mr. Beebe: I have not asked him about any conversation with Judge Carpenter. I asked him if he at any time—

The Court: Went before the court.

Mr. Beebe: Went before the court by petition or otherwise.

Mr. Moses: You asked the witness the questions as to whether he ever told Judge Carpenter concerning his loans from the bank, whether he had told Judge Carpenter something else, whether he ever told Judge Carpenter this, that or the other thing, I have overlooked the number of questions that were placed by you. Now, in the light of that cross-examination, we again offer the letter of June 9, 1931, as something he told Judge Carpenter. The offer was refused. Exception by defendants taken and allowed. Thereupon court adjourned until tomorrow morning.

Thursday, September 19, A. D. 1934, court met pursuant to adjournment. Present and appearances the same as
342 before when the following proceedings were had, to-wit:
Appearances; Same as before.

HENRY W. FREEMAN, a witness on behalf of the defendants, having been duly sworn, testified on direct examination by Mr. Smith, as follows:

I am the same Henry W. Freeman who testified in behalf of the plaintiffs and am at present Clerk of the United States District Court. At the time I testified for the plaintiffs I produced the envelope containing some reports of receivers and trustees that had been located in the vault, which was marked for identification as defendants' Exhibit 3.

Q. Will you look through these reports and state whether you find one by Frank M. McKey under date of October 5th, 1931, as to funds on deposit as receiver and trustee in Continental-Illinois and First National Banks.

Objection by plaintiffs as immaterial. Objection overruled. Exception taken and allowed.

A. There is in this file a report purporting to be made by Frank M. McKey under date of October 5th, 1931, which I have before me, showing funds deposited in certain designated depositaries.

Q. Will you look at that report and state what it shows with reference to the deposit of funds that this receiver had on deposit in the Continental-Illinois Bank and Trust Company?

Objection as immaterial what another receiver has on deposit. Objection sustained. Exception taken and allowed.

The Court: It is immaterial what other receivers may have done. He did the same thing that you claim Howard did. The court has permitted you to go ahead and you try to show that Howard made these reports.

Mr. Moses: I merely want to say that according to one of the charges in the declaration it was the duty of Mr. Howard not to deposit more than $50,000 in the Phillips State Bank and Trust Company, and it may have gone to the jury that he might have deposited his money in other banks. The purpose of this proof is merely one step in a line of testimony with respect to everyone of these other bank depositories.

The Court: You may proceed.

Mr. Smith: I think we can shorten the testimony of this witness by making a formal offer of all that we expect to prove by him and this offer is made in connection with a showing on behalf of the plaintiffs—

Mr. Beebe: I do not care to have any statements read in front of the jury at this time.

The Court: I am assuming you are seeking to offer other reports like the one of Mr. McKey, filed by other trustees, with respect to their deposits in other banks, for the purpose indicated by Mr. Moses.

Mr. Smith: And for the purpose of showing that the deposits in the other depositaries that plaintiff has introduced proof with reference to were in excess of their depositary bonds.

Mr. Beebe: I object to that.

Mr. Smith: The same situation.

Mr. Beebe: I object to that statement being made at this time.

The Court: Yes.

Mr. Beebe: It is highly improper.

343 The Court: I think you can save your point.

Mr. Smith: Well, I want to get my offer in the record.

The Court: You had it here. You marked that for identification as exhibiting the scope of your offer.

Thereupon witness produced from said file reports of Frank M. McKey and others, as trustees and receivers in bankruptcy showing funds on deposit in certain depositories which reports were marked defendants' Exhibit 33, for identification, and the same were offered in evidence, in which offer the plaintiffs objected as being immaterial, which objection was sustained and exceptions to the court's ruling taken and allowed. The reports so offered in evidence are as follows: a report by Frank M. McKey of bankruptcy funds on deposit as of October 5th, 1931, in certain depositories, showing among the banks listed deposits in the Continental-Illinois Bank and Trust Company amounting to $116,414.16 and deposits in the First National Bank of Chicago, amounting to $39,355.81; a report of Fred E. Hummel of bankruptcy funds on deposit as of October 5th, 1931 in certain depositories showing, among the banks listed, deposits in the Continental-Illinois Bank and Trust Company amounting to $48,170.10 and deposits in the First National Bank of Chicago amounting to $253,097.04; a report of W. M. Martin of bankruptcy funds on deposit as of October 5th, 1931 in certain de-

positories, showing, among the banks listed, deposits in the Continental-Illinois Bank and Trust Company amounting to $39,299.08 and deposits in the First National Trust and Savings Bank amounting to $25,135.72; a report of E. H. Johnson of bankruptcy funds on deposit in certain depositories, showing, among the banks listed, deposits in the First National Bank of Chicago amounting to $122,367.28; a report of Sol B. Optner of bankruptcy funds on deposit in certain depositories showing on deposit in the Continental-Illinois Bank $42,048.41 and on deposit in the First National Bank, $19,502.88; a report of Chicago Title & Trust Company of bankruptcy funds on deposit in certain depositories, showing, among the banks listed, deposits in the Continental-Illinois Bank and Trust Company amounting to $421,514.84 and deposits in the First National Bank of Chicago amounting to $455,009.85. It is stipulated and agreed that the foregoing statements as to the contents of defendants' Exhibit 33 for identification shall be and the same are in lieu of setting out said exhibits in detail.

Thereupon, a certain sheet of paper containing a compilation of deposits as shown from defendants' Exhibit 33, for identification, was marked defendants' Exhibit 34, for identification, and was offered in evidence by the defendants, to which offer the plaintiffs objected as immaterial. Objection sustained, exception taken and allowed. Defendants' Exhibit 34, for identification, is in words and figures as follows:

344 DEFENDANT'S EXHIBIT 33.

(Letterhead of Frank M. McKey, Chicago)

October 5, 1931.

To Charles M. Bates, Clerk, of the United States District Court, Chicago.

I beg to report that the following is a true statement of bankruptcy funds deposited with designated depositories by me as Receiver or Trustee as of October 5, 1931:—

Central-Republic Bank & Trust Co.	$309801.80
Continental-Illinois Bank & Trust Co.	116414.16
First National Bank of Chicago.	39355.81
Harris Trust & Savings Bank.	1097.71
Peoples Trust & Savings Bank.	322.18

FRANK M. MCKEY.
Frank M. McKey.

345 To the Honorable George A. Carpenter, Judge of the District Court:

Report of Bank Balances
as of October 5, 1931,
of
Fred E. Hummel as Receiver or Trustee

Central-Republic Bank & Trust Co.	$280,950.85
Continental-Illinois Bank & Trust Co.	48,170.10
First National Bank of Chicago	253,097.04
Harris Trust & Savings Bank	69,395.96

346 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

To the Honorable Judges of Said Court:

The following is a true and perfect financial statement of the amount of monies belonging to bankruptcy estate deposited by me with depositary banks of this Court, as of October 1st, 1931, viz:

Joliet Trust & Savings Bank,	$6915.79
First National Bank of Chicago,	122367.28

Respectfully submitted,
E. H. JOHNSON

347 (Letterhead of M. M. Martin, Chicago)

October 5, 1931

Hon. George A. Carpenter, Judge,
United States District Court,
Federal Building,
Chicago, Illinois.

Honorable Sir:

Pursuant to your order as to banks in which I have deposited estate monies, have to submit the following:

First National Trust & Savings Bank,	$25,135.72
Continental-Illinois Bank & Trust Co.	39,299.08
Central Republic Bank & Trust Co.	280,598.42

Very truly yours,
M. M. MARTIN

MMM-LCJ

348 (Letterhead of Saul B. Optner, Chicago)

October 3, 1931.

Mr. Chas. Bates, Clerk,
United States Dist. Ct.,
Federal Building,
Chicago, Illinois.

Dear Mr. Bates:

In accordance with an order recently issued by his Honor, George A. Carpenter, I am listing below a record of such funds held by me for the benefit of creditors as Receiver and Trustee, as of September 30, 1931.

Estate	Depository First National Bank
Ralph M. Nash vs Davis Industries, Inc, Equity Case No. 10072	$17,392.98
West Town Building Mat'l and Fuel Co, Bankrupt, Case No. 47490.	1.24
Philip Fazio, doing business as Philip Fazio & Co., Bankrupt, Case No. 47267	1,637.78
Seneca Securities Corp., vs Medinah Athletic Club, Equity Case No. 10655	470.88

Estate	Depository Continental Illinois Bank
Seneca Securities Copr., vs Medinah Athletic Club Equity Case No. 10655	$42,048.41

Yours very truly,
SOL B. OPTNER

SBO:CB

349 Chicago Title and Trust Company

List of Federal Court Cases Showing Balance of Funds on Hand at Close of Busi
October 3, 1931 and Names of the Banks Wherein Said Funds Are Deposited.

		Receiverships	Balance	Where Deposited
Trust	#19599	Wickwire Spencer Steel Co.	$ 81,381.75	First National Bank, Chicago, Illinois
"	#24215	Chicago Air Service Co., Inc.	19,755.18	" " " " "
"	#24615	Garard Trust Company	102,535.02	Continental Illinois Bank & Trust Co., Chicago, I
"	#24766	De Wolf & Co., Inc.	20,489.59	First National Bank, Chicago, Illinois
"	#25635	Sharp & Smith	10,716.20	" " " " "
"	#25768½	Prince & Whitely	81,728.17	" " " " "
"	#26140	H. O. Stone Inv. Trust Co. et al	18,985.97	" " " " "
"	#27055	Pynchon & Company	107,405.84	" " " " "
"	#27180	American Bond & Mortgage Corp.	72,787.85	" " " " "
"	#27235	North Western Terra Cotta Co.	99,330.39	Continental Illinois Bank & Trust Co., Chicago, I
"	#27250	Straus Bros. Inv. Co.	47,134.96	" " " " " "
"	#27289	Wextark Radio Stores, Inc.	119,995.56	$119,492.25—Continental Ill. Bank & Trust Co 503.31—Harris & Savings Bank
"	#27478	W. G. Moorehead & Co.	12,523.53	Continental Illinois Bank & Trust Co., Chicago, I
"	#27499	Albert Pick Barth & Co.	159,549.01	" " " " " "
"	#27504	Albert Pick & Company	441.93	" " " " " "
		Trustee in Bankruptcy		
Trust	#22611	Hinkamp & Company	5,113.05	$3,816.98—Hyde Park-Kenwood Nat'l Bank, Chic 1,296.07—First National Bank, Chicago, Ill.
"	#24498	Keystone Radio Laboratories, Inc.	17.18	16.00—Hyde Park-Kenwood Nat'l Bank, Chic 1.18—First National Bank, Chicago, Ill.
"	#24499	W. C. Braun Company	701.92	First National Bank, Chicago, Illinois
"	#25514	Rural Grain Company	43,347.38	" " " " "

Certified correct—

CHICAGO TITLE AND TRUST COMPA
By M. J. FLYNN
Ass't Treas

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350 Tabulation of Trustees and Receivers Funds in Bankruptcy on deposit in Certain Banks as Shown from Certain Reports Marked Defendants' Exhibit 33, for Identification:

First National Bank of Chicago

Date	Receiver or Trustee	Amount
Oct. 5, 1931	Frank M. McKey	$ 39,355.81
Oct. 5, 1931	Fred E. Hummel	253,097.04
Oct. 5, 1931	W. M. Martin	25,135.72
Oct. 1, 1931	E. H. Johnson	122,367.28
Oct. 3, 1931	Sol B. Optner	19,502.88
Oct. 3, 1931	Chicago Title & Trust Co.	455,009.85
	Total	$914,468.58

Continental-Illinois Bank and Trust Company

Date	Receiver or Trustee	Amount
Oct. 5, 1931	Frank M. McKey	$116,414.16
Oct. 5, 1931	Fred E. Hummel	48,170.10
Oct. 5, 1931	W. M. Martin	39,299.08
Oct. 3, 1931	Sol B. Optner	42,048.41
Oct. 3, 1931	Chicago Title & Trust Co.	421,514.84
	Total	$667,446.59

Q. In this envelope that you testified about in your examination the other day, you produced therefrom a letter or report dated June 9th, 1931, by the defendant, Sam Howard, being defendants' Exhibit 1, for identification. Will you further examine this envelope and state whether you find any letters and reports therein from Mr. Howard during the year 1933?

Objection as immaterial, too remote. Objection sustained. Exception taken and allowed.

Thereupon the defendants offered to prove and introduce in evidence a letter from Sam Howard heretofore marked for identification as defendants' Exhibit 31 and a report of Sam Howard heretofore marked for identification as defendants' Exhibit 32, showing the form in which the letter was made up and the report attached thereto and the filing thereof with Joseph A. Muir, Chief Deputy Clerk of the United States District Court.

Objection, sustained, exception taken and allowed.

The papers and documents marked defendants' Exhibits 31 and 32, for identification, are in words and figures as follows, to-wit:

351 DEFENDANTS' EXHIBIT 31.

(Letterhead of Sam Howard, Chicago)

February 7, 1933.

Joseph A. Muir,
Chief Deputy Clerk,
Federal Building,
Chicago, Illinois.

My dear Mr. Muir:—

I beg to submit herewith my statement showing balances in the respective depositaries as of the close of business January 1st, 1933.

Very truly yours,
SAM HOWARD

SH:a
encl.

352 DEFENDANTS' EXHIBIT 32.

Statement of Sam Howard
of
Balances in the Respective Depositaries
as of the Close of Business Jan. 1, 1933.

Balance on deposit in Receiver and or Trustee accounts in the American National Bank & Trust Co.	$ 77,559.35
Balance on deposit in Receiver and or Trustee accounts in the Continental Illinois National Bank & Trust Co.	166,689.31
Balance on deposit in Receiver and or Trustee in the First National Bank of Chicago	36,539.86

353 ANNE C. PACHUCKE, called for redirect examination on behalf of the defendants, testified as follows:

I have made an analysis of the receivers and trustees reports that were in the envelope described as the envelope kept by Miss Howard, secretary for Judge Carpenter, and I have noted the ones that are marked filed by the Clerk and the ones that have not been marked filed. In the year 1931 there were 25 reports that had no file mark on them and 16 that did have a file mark on them. In 1932 16 reports were marked filed and 47 had no file mark on them. In 1933 8 reports were marked filed and 26 had no file mark on them. I have also made an examination of the file that was produced by Mr. Scherer as distinguished from the one produced by Miss Howard. Of the reports in this file for 1931, I found 7 therein and they are all marked filed. I found no 1932 reports and in 1933 there were 8 marked filed and 21 that were not marked filed, and in 1934 there were 24 marked filed and 37 that were not marked filed.

Thereupon the defendants rested their case in chief.

Thereupon the plaintiffs, to further maintain the issues in their behalf, introduced rebuttal testimony as follows:

MARGUERITE GILMOUR, witness on behalf of the plaintiff, having been previously sworn, recalled and testified on rebuttal as follows:

The document you hold in your hand, marked plaintiff's Exhibit 21 for identification, I have produced from the files of this court and it is the original of that which it purports to state on the outside. Thereupon the plaintiffs offered in evidence the petition filed by the Phillips State Bank and Trust Company and heretofore marked as plaintiff's Exhibit 21, for identification, which was received in evidence as PLAINTIFF'S EXHIBIT 21 and is in words and figures as follows, to-wit:

354 PLAINTIFF'S EXHIBIT 21.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

In the Matter of
Petition of Phillip State Bank and Trust Company of Chicago, Illinois, to be Designated by the Court as a Depositary for the Money and Funds of Bankrupt Estates.

To the Honorable Judges of Said Court:

Your petitioner, Phillip State Bank and Trust Company, of the city of Chicago, Cook County, Illinois, respectfully presents unto the Court that it is a corporation organizing and existing under and by virtue of the banking laws of the state of Illinois; that it was organized as such corporation on March 1, 1915, and since that time has conducted a general banking business in the city of Chicago, county of Cook and State of Illinois.

Your petitioner further represents that it is desirous of being designated by this Honorable Court as a Depositary for the money and funds of bankrupt estates as provided by Section 61 of an Act of Congress entitled, "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and for the purpose of qualifying as such depositary it herewith tenders its bond with good and sufficient security, as required by said Act, which said bond runs to the United States of America.

Your petitioner therefore prays that an order be entered by this Honorable Court designating your petitioner as such Depositary in accordance with this petition.

355 PHILLIP STATE BANK AND TRUST COMPANY,
By: CLARENCE A. BEUTEL,
President.

State of Illinois } ss.
County of Cook }

CLARENCE A. BEUTEL, being first duly sworn, on oath deposes and says that he is the president of the Phillip State Bank and Trust Company, of Chicago, Illinois, and is author-

ized to make the above and foregoing affidavit, and does so for and on behalf of the petitioner, Phillip State Bank and Trust Company, and that the foregoing petition by him subscribed is true.

CLARENCE A. BEUTEL.

Subscribed and sworn to before me this 5th day of August, A. D. 1930.

D. HAROLD DAVIS,
Notary Public.

356 Thereupon the plaintiff rested its case in rebuttal.

This was all the evidence offered or received in these proceedings.

Thereupon the defendants moved the court to exclude all the evidence from the jury on the grounds that the evidence introduced by the plaintiff does not prove any allegations in any of the complaints as amended and on the further ground that there is no evidence in the entire record that Howard had any notice or knowledge of the facts as to the alleged condition of the bank or the withdrawals, and on the further ground that there is no duty on the defendant Howard, under the law, to do anything that was urged in any of the complaints as amended.

Motion denied, exception taken and allowed.

Thereupon the defendants moved the court to direct the jury to return a verdict in their favor.

Motion denied. Exception taken and allowed.

357 Thereupon the case was argued.

In the course of argument of counsel for the defendant, Mr. Lloyd D. Heth, the Court interrupted counsel's argument.

To which the defendants at the time excepted, which exception was allowed.

The argument as made and the interruption and statement of the court are as follows:

Mr. Heth: Here is a man that is running a big business. He says, "I have to have some money." No doubt about it, is there? A man running a tremendous business has to have some money to run the business. He needs a lot of money to advance to custodians, in the running of the business. Now, I have to have money. What business man does not? Is there anything peculiar about it? He wants to make something sinister out of all that, of course, ordinary business

transactions. He says, "I have to have accommodations. If I go out there, I owe some money to other banks, and if I am going to deposit with you, and not with them, why, I would be a fine person wouldn't I, if I borrowed money from a bank and took my account out of there?" Business men do not do that. They are accommodated with loans because they are customers of the bank. So Howard says, "All right, if you will accommodate me with loans; in the ordinary course of business of our company out there," he says, "I want to pay back these loans in these other banks—

The Court: Mr. Heth, pardon me for interrupting. In order that you may be apprised of it, I shall say to the Jury that the arrangement you are discussing was not within the competence of Howard nor the Bank to make.

Mr. Heth: Was not what?

The Court: Within their competence to make, not an agreement or understanding that can exist between one depositing trust funds and a bank.

Mr. Heth: Well, do you mean that? It did exist. You do not mean it cannot exist?

The Court: That is what I mean. I mean it cannot exist.

Mr. Heth: Well, it did exist, of course. Well, I except to it.

Counsel for the defendants, Mr. Lloyd D. Heth, argued further before the jury as follows:

"Oh, he wants to pick out the banks that stayed open, and say that 'If Sam Howard put his money in those banks—look at it, men of the jury, he would have been safe' but tell me, did you know, did Sam Howard know in June of 1932 whether the First National Bank of the City of Chicago was going to remain open? Tell me that. We know it now, but how
358 about them? As a matter of common knowledge, who didn't see the Loop of the City of Chicago thronged with frantic depositors—."

To which argument plaintiffs objected, which objection was sustained, to which ruling the defendants took an exception which was allowed.

Said counsel for the defendants argued before the jury further, as follows:

"Well, men of the jury, Sam Howard is to be held to the standards of what we know today, and he says to Sam Howard, 'You are careless. You shouldn't have put $400,000.00

in the Phillips State Bank, because it had only a $50,000.00 depository bond.'

"Show me a bank where he could have put it, that it would have been safer, as it appeared at that time. Is there any evidence that if he had put his money in the First National Bank and had taken it all out in the first part of June, 1932, when he says that things were getting bad—if he had taken that money out and put it in the First National Bank of Chicago, what relation would Sam Howard's deposits in the First National Bank have borne to the depository bond of that bank?"

Thereupon the defendants objected to this argument as immaterial.

Mr. Heth: It isn't immaterial? I have the right to draw inferences. I'm not talking evidence.

The Court: Well, I think you are getting outside the evidence.

Mr. Heth: I am not talking evidence, I am calling for inferences.

The Court: I know it.

Mr. Heth: And I am commenting on the absence of evidence; and I submit that I am fully within my rights when I do that.

The Court: The jury in this case is not going to be called upon and can't be called upon to try to figure out that, in case the evidence shows the trustee to have been careless, what his particular course should have been with the money. The jury is not called upon to figure out what bank he could have put it in.

Mr. Heth: Well, your Honor, that is a matter of instruction—

The Court: I am speaking now of the case, and the theory upon which it will go to this jury.

Mr. Heth: That is all right: I understand that, but I
359 can't see how that should curb me in my drawing of inferences as to what this court is going to instruct the jury. I have not gone outside of the evidence. I have not misquoted to my knowledge one single thing in this case.

The Court: All right, go on.

Subsequently in his argument Mr. Heth said to the jury: "The evidence is that Mr. Beutel told Mr. Howard that the Central Trust Company of Illinois with $168,000,000.00 was behind the Phillips State Bank and Trust Company and would come to its rescue in any emergency and it ran out on him; it didn't do it."

Mr. Beebe: I object to that, also.

The Court: The objection is good. There is no evidence that the Central Trust Company agreed to do it.

Mr. Beebe: And no evidence that it ran out on him.

The Court: No.

To which ruling of the court and statements of the court the defendants took an exception, which was allowed.

In the course of argument of counsel, Julius Moses, on behalf of the defendants, counsel argued to the jury:

"How many trustees and receivers in bankruptcy do you suppose there were in the year 1931, when these crashes were coming one after the other? Where were these assets being administered? In the bankruptcy courts. Where were the trustees keeping their money on deposit, according to the statute and the rules? In a depository.

"How many millions of dollars do you suppose those receivers and trustees had in their custody at that time, as compared to this $400,000.00 that Mr. Howard alone had which he put into this bank? Why, gentlemen, you have a right to infer from this evidence, and from what you have seen in this case and what you know of conditions as they existed in 1931, that there were millions of dollars on hand in the depository—"

Thereupon the plaintiffs objected to this argument as it had nothing to do with this case. Objection sustained. Exception by the defendants taken and allowed.

Thereupon Counsel, Mr. Julius Moses, argued further on behalf of the defendants:

360 "Rumors are matters of common knowledge. You read the newspapers; you know what was talked about; you don't have to close your mind about what was going on and what was being done and talked about, simply because you are jurors in this case.

"Against whom were the rumors directed, gentlemen? You know as well as I do. When the Insull collapses occurred in April, what banks—hark back to April, 1932, two months before this bank failed—what banks were rumors addressed against, within your common knowledge?"

Thereupon the court interrupted as follows:

"Well, I don't believe this jury is privileged to discharge its duties in that way. The jury can't upon an appeal of counsel, go outside of the evidence and decide among themselves what recollection they have of other matters occurring

three years ago, and allow them to proceed to discharge their duty in this case in that manner. It can't be done."

To which statement of the court the defendant took an exception which was allowed.

361 At the conclusion of all argument to the jury the defendants made the following specific requests to the court to instruct and charge the jury:

The defendants request the court to charge the jury that the law did not impose upon the defendant, Sam Howard, the duty to investigate and ascertain the financial condition of the Phillip State Bank and Trust Company which had been designated by the court as a depository of bankruptcy funds and to report its financial condition to the court.

The defendants request the court to charge the jury that there was no duty upon the said defendant, Sam Howard, to report to the United States District Court any fact which was a matter of common knowledge in the community and if you believe from the evidence that it was a matter of common knowledge in the community that receivers had been appointed by the state courts for the certain banks shown by the evidence to have been placed in the hands of receivers by the state courts, then it was not necessary for said defendant, Sam Howard, to report the fact of such receiverships to the District Court.

The defendants request the court to charge the jury that there was no duty imposed by law upon the defendant, Sam Howard, to limit the amount of deposits of bankruptcy funds made to him in the Phillip State Bank and Trust Company to the amount of $50,000.00, the amount of the depository bond.

The defendants request the court to charge the jury that no duty was imposed by the law upon the defendant, Sam Howard, to ascertain the amount of bankruptcy funds deposited by other receivers or trustees in bankruptcy in the Phillip State Bank and Trust Company, or in any other bankruptcy depository, for the purpose of ascertaining whether the total aggregate amount of the funds deposited by such trustee or receivers in bankruptcy in any given depository exceeded the penalty of the bond required of such depository by the District Court as a condition of becoming a depository of bankruptcy funds of the court.

The defendants request the court to charge the jury that the defendant, Sam Howard, was not an insurer of the bank-

ruptcy funds which came into his possession as receiver or trustee in bankruptcy.

The defendants request the court to charge the jury that it was the duty of the United States District Court to investigate and ascertain the financial condition of such bank as made application to the Court to become a designated depository of bankruptcy funds, and accordingly it was the duty of the District Court to investigate and ascertain the con-
362 dition of the Phillip State Bank & Trust Company when said bank made application to the court to become a designated depository of bankruptcy funds, and that it was likewise the duty of the court to fix and determine the amount of the depository bond to be filed by said depository and that said District Court had, by virtue of the law the power and it was its duty to revoke said designation if it determined that said bank was unsafe or to raise the amount of the penalty of the bond that it demanded, as in its opinion occasion might require.

The defendants request the court to charge the jury that at the times when the defendant, Sam Howard, kept on deposit with Phillip State Bank & Trust Company the funds involved in this suit, there was in full force and effect a rule of the United States District Court for the Northern District of Illinois, Eastern Division, as follows:

"Payment of moneys deposited.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and counter-signed by the judge of the court or by a referee designated for that purpose, or by the clerk of his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said check."

That by virtue of the foregoing rule of said court, all moneys deposited by said defendant, Sam Howard, in said Phillips State Bank & Trust Company, as trustee in bankruptcy for the various estates involved in this suit, were

subject to withdrawal from that bank as depository, only in the event that the checks or warrants for such withdrawal were countersigned by the judge of the court or by a referee in bankruptcy of said court, or by the clerk or his assistant under an order made by the judge stating the date, the sum, and the account for which it is drawn; that in arriving at their verdict in this case the jury have a right to take into consideration the fact that by virtue of such rule all checks or warrants signed by said defendant, Sam Howard, as trustee in bankruptcy of the various estates involved in this suit, were required to be countersigned by the judge of the court, or by a referee in bankruptcy, or by the clerk or his assistant, under an order made by the judge, stating the date, the sum, and the account for which it was drawn.

363 The defendants request the court to charge the jury that at the times when the defendant, Sam Howard, kept on deposit with Phillip State Bank & Trust Company the funds involved in this suit, there was in full force and effect an Act of Congress as follows:

"Duties of Trustees.

(a) Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates;

* * * (3) Deposit all money received by them in one of the designated depositories;

* * * (4) Disburse money only by check or draft on the depositories in which it has been deposited;

* * * (8) Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

* * * (10) Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts;"

The defendants request the court to charge the jury that the United States District Court had the right and power in its order designating the Phillip State Bank & Trust Company as depository of bankruptcy funds, to limit the amount of the deposits which might be received by it from bankruptcy trustees and receivers, to the amount of the penalty of the depository bond required by the order of the court to be given by said depository as a condition to its becoming a depository of bankruptcy bonds; and that in arriving at their

verdict in this case the jury have the right to consider the fact that the said District Court did not exercise its power to limit the amount of the deposits which might be received by Phillip State Bank & Trust Company from bankruptcy trustees and receivers, to the amount of the penalty of said bond.

Defendants request the court to charge the jury that if the jury believe from the evidence that Judge Carpenter was informed as to the amount of funds the defendant, Sam Howard, had on deposit in the Phillip State Bank & Trust Company and was informed as to the amount of the depository bond, and if you further believe that having such information Judge Carpenter at no time thereafter revoked the order designating said bank as a depository of bankruptcy funds, and at no time raised the amount of its depository bond, then said defendant, Sam Howard, had the right to assume and believe that in the opinion of the United States District Court the Phillip State Bank & Trust Company as a designated bankruptcy depository was a safe place in which said defendant, Sam Howard, could continue to deposit funds held by him as receiver or trustee in bankruptcy.

364 The defendants request the court to charge the jury that there is no evidence in the record in this case proving, or tending to prove, that the said defendant, Sam Howard, failed to well, faithfully and truly account for all the moneys of the estates referred to in this cause which had come into his possession as receiver or trustee in bankruptcy. Each and every one of which requests were separately and collectively denied and refused.

To each and all of which rulings of the court denying and refusing said requested instructions and charge the defendants took an exception, which was allowed.

365 Thereupon the court charged and instructed the jury as follows:

The Court: Gentlemen of the jury, I will endeavor as briefly as I can to say such things to you as I think should be said by way of instruction and guidance to you in the consideration of the evidence in this case, and its determination by you upon the issues that are here.

I said, "the case"—I mean the cases, of which there are three in number, and which have been consolidated for convenience in trial.

One of the cases proceeds upon 113 counts or claims, the

second upon 9 counts, and a third one upon 1 count. Is that correct, gentlemen?

Mr. Beebe: That is right, your Honor.

The Court: Making in all 124?

Mr. Beebe: 123.

The Court: 123 claims or cases. And they all arise upon bonds that were given in bankruptcy, to assure the fidelity and integrity and the performance of duties on the part of the defendant Howard, who, in these cases, had been appointed either Trustee or Receiver, to discharge such duties as the law imposed upon him in the administration of bankruptcy estates or in the custodianship of property in bankruptcy proceedings. And the bonds, while varying slightly, are substantially of the same tenor and effect; and they are here pressed for enforcement by the plaintiff, who is a successor Trustee in the bankruptcy court. They are pressed for enforcement upon the one charge that the defendant Howard breached the conditions of those several bonds, with respect to the performance of his obligation to account, and to perform his duties as trustee or receiver agreeably to the law.

I do not know whether it is necessary at this time to give you an admonition that I gave to counsel during the discussion; and it is this: That in the consideration of these cases, you are to be concerned solely with the consideration of the evidence, determining what credit you will give to it, and where, upon fair and dispassionate consideration, it leads you, with respect to the determination of the one matter that is here in issue; namely, the conduct of the defendant Howard in the performance of his duty as either trustee or receiver, in the light of the obligation which the law placed upon him as trustee, or, as it is at times called, a fiduciary.

There were references in the testimony to what were
366 characterized as matters of common knowledge, asserted occurrences outside of any proof here, assumed at the time, or since then, to have come to your knowledge as men of affairs in this community; and it was suggested, necessarily by implication, that you take those matters into consideration in determining this case. That, you are not privileged to do, gentlemen. You are required to consider the evidence here as the single and the sole body of matters of fact testified to or brought into the case for the purpose of determining the question which is for you to determine.

At the outset, gentlemen, you are considering here the obligations which the law places upon a trustee or, as I said

a moment ago, a fiduciary, with respect to the care that he is to bestow upon the conservation and the disposition of property of others entrusted to him for purposes of administration.

Under the law, that is a high duty, calling for the exertion by him of the highest good faith, and, so far as he is concerned personally, disinterestedness with respect to every other desire that he may have except the desire to discharge the trust.

Coming now to a matter of practice and procedure, the bankruptcy law makes some provision for the deposit and for the care of funds coming to bankruptcy functionaries, by endowing the court, empowering it with the duty of designating depository banks. That is what it comes down to.

That law, being followed by the courts, results in withdrawing from the functionaries of the court, such as trustees or receivers, a discretion to deposit them ordinarily elsewhere; or certainly, a discretion to deposit them wherever a functionary may please to deposit them. And therefore, when the court by order designates a bank as a depository, a trustee or a receiver is privileged to use such a depository, or some other depository, and is precluded from making his own choice—I mean, outside of the range of designation.

The law, however, does not and is not to be taken by any one as a guaranty by the court of the solvency of the depository for an unlimited period of time; nor as a warrant to a trustee or a receiver to relax or to ignore a duty otherwise resting upon him to act in case of actual danger with respect to the designated depository.

In other words, although the court under this law designates these depositories, the trustee or the receiver is none the
367 less obliged to take note of anything that may affect the prudence and the care of continuing on his part to recognize such a depository; and in no event is he privileged, in the face of facts which challenge the propriety of continuing, or the safety of continuing to use that depository—in no event is he allowed to ignore such a situation, and merely continue to deposit on the assumption that the court will find out in its own way, whether or not such a depository should be used, whether the trustee or receiver in fact thinks it should be or not.

And therefore, in this connection, the plaintiff has brought to the attention of the court evidence respecting the deposit of funds by the defendant Howard as Trustee or Receiver, in the designated bank, the Phillips State Bank, which is the

bank here under inquiry, in an amount greatly in excess, from the very start, of the amount of a surety bond given by that depository.

I would say to you that the mere deposit of a sum in excess of that is not, standing alone, necessarily negligence. But, when a trustee or receiver knows that, so far as the particular depository is concerned, it has given a bond which affords protection or security for a specified amount; then a trustee or a receiver should, in prudence, take note of the fact whether the deposits which he is making greatly exceed the amount of the surety bond thus given.

And therefore the duty of the trustee in that connection may arise, and in my opinion it does arise in this case, the question as to the duty, in connection with the other evidence in the case respecting the history of the bank, respecting its progress throughout the year and a half that is here under review; to the end that we may ascertain in that history there arose facts which, coming to the knowledge or notice of the trustee or receiver, challenged the propriety of his continuing to deposit, and to leave there amounts greatly in excess of the security bond given by the depository.

And you have a right to take this evidence, and should take it, to consider whether, under the circumstances of this case, the deposit of these various amounts, the continued maintenance of deposits greatly in excess of the amount of the security bond given by the depository, constituted a want of reasonable care, a want of prudence by the defendant Howard, who was required to exercise a high degree of prudence and care in order to safeguard the funds entrusted to him in either capacity, as receiver or trustee.

I come to the consideration of another matter that has been referred to here in the discussion, and is, in my judgment,
368 a somewhat outstanding matter upon the evidence. And that is the evidence that deals with the manner in which the relationship of the defendant Howard and the bank arose; what was said and done at that time, in the way of creating an understanding or a sort of a condition upon which he entered as a depositor of the bank.

And, while you must recall the testimony, I say it was in substance this: That the arrangement was entered into upon the promise and undertaking, in substance, by the bank, that if the defendant Howard would deposit his trust funds in that bank, he would have a certain personal credit; and I think the testimony is rather clear that, practically concur-

rently, within a day or so of his relationship, if not before, he was granted a very considerable personal loan, by the Phillips State Bank. That it was thereafter continued, and continued with the exception of the repayment of about $1015—$1150, throughout the entire period of his deposit of funds in the bank.

I say to you, gentlemen, that that sort of an arrangement, whereby the person of the trustee is allowed to come into transactions personal to himself—and that is what these loans were, no matter how he wanted to use the money—that that sort of a bargaining, if I can so call it, that sort of an admixture of his personal desires with his trust obligations, is utterly repugnant to what the situation permitted; not only under the law, but upon any sort of a test of propriety permitted either to the bank or to the trustee.

Now, the importance of that in this case comes about in this way: Its consideration by you of the effect of that sort of an arrangement and understanding upon the discharge of trust obligations. And I say to you that it was improper, for the reason that it fettered, if I may use that term, the trustee or functionary in discharging his trust obligations. He could not with singleness of devotion regard the trust funds as being subject to his conservation upon appeal to what was prudent, for the reason that he was obligated to the bank in a personal way, which obligation concurred with, and, as I said a moment ago, was admixed with the trust obligation, so that the discharge of the trust obligation brought before him the necessity of his discharging his personal obligations.

And therefore, this fact being determined, as I think it should be determined, of the character in law that I have just characterized it, bears importantly upon the situation in which the defendant Howard was left, and in which he found himself from time to time, in interpreting things that occurred, the mere occurrence of which bore pertinently and necessarily upon the fact as to the condition of that bank,
369 and his own view of it, and the course that he should pursue in respect of further continuing as a depositor, either as trustee or receiver.

In other words, these matters—and it is for you to remember the testimony, but as my recollection serves me, came to Mr. Howard's attention for the first time in a rather decided manner as early as April, 1931, through a run which was found to have developed on the bank. You will remember the testimony respecting the seriousness of it. That was followed

by a run in June, in September, and at or about the holidays of that same year; with a subsequent run the following year, resulting in the closing of the bank.

Now, gentlemen, take this proof and consider it in the manner in which I have indicated, by asking yourselves the question:

How should these proofs have impressed a reasonably prudent man, having no desire other than to safeguard and to conserve, with a singleness of devotion to the trust obligation, how should they have impressed Mr. Howard during this period of time, with respect to the course that he should pursue?

And I want to say to you that you are called upon here to apply the rule that would guide a reasonably prudent man; and that it is not a question of your individual willingness, if you saw fit to try to put yourself in his place, to answer by trying to determine speculatively what chances you might be willing to take. For a trustee cannot take chances which he may figure, if it were his personal matter, he might be willing to take. He is under the obligation which I have referred to.

Now, if upon a careful survey of all of this evidence, you feel that this bank was in a safe condition, and that there was nothing there that indicated the necessity of regarding it as involving hazards, great hazards to the trust funds, and that the defendant Howard knew of nothing that would challenge his right to continue not only to deposit, but to increase the deposits in the light of all the evidence here, as developed, your verdict in this case should be for the defendants.

If, on the other hand, you are satisfied that this bank throughout the period that is here under review had become a hazardous place to have trust funds, and taking into consideration what the defendant Howard knew about that,—and you have a right to go through the whole body of the evidence and determine what facts he knew respecting the condition of this bank; such facts as he would learn from an examination of the reports; such facts as he could infer from the circumstances that the officers of the bank themselves had concern respecting its ability to discharge its obligations to 370 creditors; and in that connection I want to say to you that those facts must be the facts that deal with the condition of the bank; and if, as is true, it was stated by men connected with other banks that they might or would stand back of it, that those things were communicated to Howard

with the idea of indicating a hopefulness on the part of those who communicated those facts to him; those facts, none the less, did not change the condition of the bank, nor alter the duty which the law imposed upon the defendant Howard in respect of those funds.

Take the evidence, gentlemen, and consider it carefully, dispassionately, for the purpose of answering this one question that is before you.

The court cannot give you any yardstick by which you should measure the testimony of witnesses. You are brought into these cases in court, as triers in behalf of the court; men of affairs in daily life; expected to be able to bring in here your ability to inquire into and determine situations which call for an ascertainment of the truth, using the same faculties here in court that you use out of court; and you should take the testimony in that way and, so far as the witnesses are concerned, consider the testimony that they give here in the light of their relationship to the case, or to the cases; their bias, and prejudice. In other words, try to find out in the first instance what the probabilities are as to the truth, in any situation that you are called upon to examine and ascertain.

And if, upon the evidence here, you are satisfied that the plaintiff by a fair preponderance of the evidence has established the fact that the defendant here breached the obligations of these bonds, you should so find in your verdict.

I say to you again, just consider the evidence here that has been brought into the cases, and treat the cases as of considerable—as of great importance.

The plaintiff suing here is the successor trustee, who, I venture to say, has no large personal interest in the matter. So far as the defendants, or either of them, are concerned, they have a deep and somewhat abiding interest in the result of this lawsuit, that may affect them or the witnesses who appeared here on their behalf, in the giving of their testimony. The question as to the weight you will give to the testimony that has been brought in here is for you to determine.

There will be three forms of verdict submitted to you: one dealing with the case that has one count in it; another with the case that has nine counts in it; and another with the case that has 113 counts in it; and it is my present feeling—on which, however, I will hear counsel—that the amount to be awarded to the plaintiff in each case is not open to controversy, if you find the issue here should be decided in favor of the plaintiff.

371 Are there any exceptions to be taken to the instructions as given by the court to the jury?

Thereupon the defendants excepted to the court's charge and instructions that the designation of the bank by the court as a depository is not a guarantee of the solvency of the bank so long as the depository bond remains in full force and effect. Exception overruled and exception to the court's ruling taken and allowed.

Thereupon the defendants excepted to the court's charge and instructions that the trustee in bankruptcy must exercise due care; that he is held to the standard of reasonable care and caution in the guarding of his funds. Exception overruled, to which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the courts charge and instruction that the jury take into consideration the fact that the deposits exceeded the depository bond. Exception overruled. To which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the charge and instruction of the court that the arrangement that was made between Mr. Beutel and Mr. Howard on loans was repugnant to the law and was improper. Exception overruled. To which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the charge and instruction of the court that the jury has the right to consider that the runs upon the bank imposed upon Howard the duty to exercise reasonable care and caution in the safeguarding of his funds and that the jury has the right to consider evidence of the condition of the bank, and in omitting from that instruction any reference to the fact that the jury has a right to consider, in determining their verdict, what Howard was told and what he reasonably believed the condition of the bank to be, and in omitting to tell the jury that it has the right and must, as a matter of fact, consider those things that were told Howard and that he believed to be the fact in considering the question of whether he exercised reasonable care and caution. Exception overruled. To which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the charge and instruction of the court in respect to the court's statement to the jury that matters of common knowledge, within their common knowledge, are not matters that they can consider

in determining the questions of fact in this case; but that they can only determine the question of fact from the evidence offered in court.

The Court: Well, I didn't mean to tell the jury—I hope I never shall—that the jury cannot consider matters of
372 common knowledge. What I did mean, and what I say again, is that the jury has not the right to take into consideration matters and happenings, say, around this court room, three, four or five years ago, and from that argue as to what the situation was in respect of the issues that are here.

Mr. Moses: Then I ask the court to charge the jury that they may take into consideration matters of common knowledge that came to their attention during the period between 1930 and 1932, which they are considering.

The Court: I decline to so charge; that is not the law. If that were the law, of course, the jury might have the right, as a part of their deliberations, to go out and inject something that might not be correct.

Exceptions by the defendants, overruled, to which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the court's charge and instruction in which the court instructed the jury that they are concerned solely with the evidence as it relates to the conduct of Sam Howard as a trustee and fiduciary. Exception overruled. To which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the charge and instructions of the court wherein, in stating the duties of the bankruptcy court, the court limited those duties merely to the designation of the depository. Exception overruled. To which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the court's charge and instructions that the law and order of the court designating the depository and the bond does not guarantee the solvency of the depository as to an unlimited period of time. Exception overruled. To which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the court's charge and instructions that although the court designates the depository the trustee is obliged to take note of everything in reference to the depository and in the face of facts showing

danger that the trustee has no right to rely on the fact that the court may have designated the depository as a depository.

The Court: Well, you want to except to the instruction which is to the effect that, although the court may appoint a designated depository, the trustee, if he knows things about that depository's safety, that he can just close his eyes to those things and say that it is the court's business, and none of mine? You don't mean that, do you?

Mr. Smith: I think that our exception goes to the law, your Honor, on that point.

The Court: Well, that is what we are talking about, what the law is; and I am stating—I am asking you that, 373 whether you can conceive that an instruction which was intended to tell the jury just what I had said a moment ago, that the trustee had no right implicitly to rely upon the designation and to rely upon it in the face of things that come to his knowledge which seriously challenge the propriety of continuing the designation?

Mr. Smith: That was not your Honor's instruction, as I understood it.

The Court: Well, I do not know. All right, that is the one I should have given; that is the one I intend now to give, by way of meeting your suggestion, if I did not give what I thought I tried to give.

Exception overruled, to which ruling the defendants took an exception which was allowed.

Thereupon the defendants excepted to the court's charge and instruction that the mere deposit in excess of the bond is not, merely in itself, negligence, but when a trustee knows that a depository has given a bond in a limited amount, he should take notice of this and exercise discretion in making additional deposits; that is, the defendants excepted to those portions of the charge and instructions of said court which say that when the trustees makes a deposit in excess of the amount of the bond he should exercise some discretion in making the deposits. Exception overruled. To which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants excepted to the court's charge and instruction with reference to a personal loan, wherein the court stated to the jury that that sort of an arrangement was personal to himself, referring to the defendant Howard, no matter how he wanted to use the money, and is repugnant—.

The Court: I think Mr. Moses excepted to that.

Mr. Heth: I excepted to it.

The Court: Mr. Moses and Mr. Heth already excepted to that.

Exception overruled. To which ruling of the court the defendant took an exception which was allowed.

Thereupon the defendants excepted to the court's charge and instructions on the issue of fact that the bargain the court stated Mr. Howard made with Mr. Beutel fettered the trustee in his function as a trustee.

The Court: All right. I didn't intend to have the jury understand that it should be particularly called "a bargain —It was an understanding or arrangement, call it whatever you want.

Mr. Moses: And that it fettered the trustee.

The Court: Yes, that is the point; it tied him up personally to meet obligations which might fetter him in discharging his trust obligations.

Exception overruled. To which ruling the defendants took an exception which was allowed.

Thereupon the defendants excepted to the court's charge and instruction which states that the plaintiff is here without any large personal interest and that the defendants
374 are vitally interested.

The Court: Well, what do you say as to the correctness of that charge?

Mr. Smith: I say the plaintiff has a large interest, and a vital interest.

The Court: Now, wait a minute. Yes, the plaintiff has a large interest; but my suggestion was that the plaintiff couldn't have a deep personal interest in this suit. Isn't that so?

Mr. Smith: No, sir, because of these commissions. He has an interest on commissions in everyone of these estates, and if this money—.

The Court: Well, he is suing in the relation of a trustee. I think I made clear that he had that.

Mr. Beebe: The plaintiff is the United States of America, your Honor.

The Court: I understand.

Mr. Smith: I except to that; the plaintiff is not the United States of America.

The Court: All right, you may have your exception. In

that connection, I might say I don't know who Mr. Willoughby is—I haven't seen him around.

Mr. Beebe: He was here.

The Court: I think I am justified in saying that on the trial of this case there was no deep personal interest manifested on the part of anybody named Willoughby. The United States, through him, is seeking recovery on the bonds.

Which exception of the defendants the court overruled, to which ruling of the court the defendants took an exception which was allowed.

Thereupon the defendants renewed their several requests for instructions and charge to the jury, as hereinabove set out, each and all of which were again severally and respectively denied, the court stating that it had looked over them and each of them and had tried to incorporate the suggestions which were pertinent by both plaintiff and defendants in its general charge. To which action of the court in severally denying and refusing to make any further charge or instructions to the jury, as requested by the defendants in their various requests and each of them as hereinabove set out, said defendants took their separate and several exceptions which were severally allowed. The defendants took their exceptions severally which exceptions were allowed.

All of the foregoing requested instructions and charge to the jury and exceptions to the court's charge and statements made with reference thereto were made and occurred in the presence of the jury and before the jury had retired for its deliberation.

375 The Court: Now, as far as the jury is concerned, I think, in the light of the instructions I gave them, you gentlemen ought to agree to insert in the verdicts the amounts which are to be found in these several cases—reserving all your rights, of course.

Mr. Heth: Of course, on the charge to the jury, we haven't seen the verdicts, but we want to except at this time to the form of the verdict given in the larger case; that is the 113 counts; and in the other case of nine counts, and request the court to submit a form of verdict on each one of the counts in those cases.

The Court: That will be denied.

Exception taken and allowed.

Mr. Heth: Now with this out of the way we can agree on the amounts.

Mr. Moses: We will only agree upon the amounts to be in-

serted, without in any way waiving our rights to insist that it is improper to give that kind of verdict to the jury.

The Court: That is all right.

Mr. Beebe: In other words, the amount will be the total sum in each of the cases?

The Court: Yes, as shown by the right-hand column in this one exhibit.

Mr, Beebe: Yes.

The Court: If that is the finding—I presume, without interest.

Mr. Beebe: Oh, yes, we haven't raised the question of interest and I don't believe in Illinois you are entitled to interest. It is a question of vexatious delay in Illinois. And thereupon said total amounts were filled in in said three forms of verdicts and transmitted to the jury, to all of which the defendants excepted as aforesaid, which exceptions were overruled and to which ruling the defendants took an exception which was allowed.

Thereupon the jury having retired to consider of its verdicts, returned into open court with its said verdicts, which verdicts so returned were in favor of the plaintiff and against the defendants in each of said three cases, that is, in case No. 43996 a verdict in favor of the plaintiff and against the defendants for $5,439.22, in case No. 44241, a verdict in favor of the plaintiffs and against the defendants for $197,076.31, and in case No. 44270, a verdict in favor of the plaintiffs and against the defendants for $23,224.92, to each and every one of which verdicts so returned by said jury the defendants took their several and separate exceptions, which exceptions the court severally denied. To which rulings of the court in severally denying said exceptions the defendants took their several and separate exceptions which were allowed.

376 Thereupon, the defendants and each of them moved the Court for a new trial and were given until the 24th day of September, 1935, in which to file their written Motion; and, thereafter, on said 24th day of September, 1935, the Court further extended the time for the defendants to file their written Motion for new trial to and including the 2nd day of October, 1935, and, thereupon a written Motion for new trial was duly filed in said cause.

Thereafter, on the 18th day of October, 1935, the said Motion for new trial having come on for hearing before the Court and the Court having considered the same, the Court overruled said Motion for new trial, to which action of the Court

in so overruling said Motion for new trial, the said defendants and each of them duly excepted, which said exception was allowed.

Thereupon, said defendants and each of them moved the Court for an entry of a judgment in favor of said defendants, against said plaintiff non obstante veredicto.

The Court thereupon considered said Motion and overruled the same, to which action of the Court in so overruling said Motion for a judgment non obstante veredicto, said defendants and each of them duly excepted, which exceptions were duly allowed by the Court.

Thereupon, the defendants and each of them moved the Court in arrest of judgment. The Court thereupon overruled said Motion of the defendants and each of them in arrest of judgment, which action of the Court in so over-
377 ruling said Motion, the defendants and each of them duly excepted, which exceptions were allowed by the Court.

Thereupon, the Court entered a judgment upon said verdict of the jury, in favor of the plaintiff and against said defendants, to which action of the Court the said defendants and each of them, then and there duly excepted, and said exceptions were allowed by the Court.

The foregoing was all of the evidence and proceedings had upon the trial of this cause.

Wherefore, the defendants and each of them tender the foregoing, as the Bill of Exceptions of said defendants and each of them, in this cause, and ask that the same be considered, settled, approved, allowed and filed as such and that the same be ordered to be made a part of the record in this cause.

SAM HOWARD,
By JULIUS MOSES,
His Attorney.
CONTINENTAL CASUALTY COMPANY,
By LLOYD D. HETH,
WM. P. SMITH,
Its Attorneys.

378 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

NOTICE.

To: United States of America, ex rel., Chester A. Willoughby, as Trustee in bankruptcy of National Mechanical Service Company, a corporation, bankrupt, et al., plaintiffs and George B. McKibbin and Walter E. Beebe, Attorneys for the plaintiffs:

You and each of you will please take notice that the defendants in the above-entitled cause are this day filing a proposed bill of exceptions, copy of which is herewith served upon you.

Dated at Chicago, Illinois, this 29 day of November, 1935.

JULIUS MOSES,
Attorney for defendant, Sam Howard.
LLOYD D. HETH,
WM. P. SMITH,
Attorneys for defendant Continental Casualty Company.

Received a copy of the foregoing and within notice and copy of the proposed billof exceptions is hereby acknowledged this ..... day of ....., 1935.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for plaintiffs.

379 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * * *

STIPULATION.

It is stipulated by and between the respective parties to the above entitled cause of action that the foregoing bill of exceptions is true and correct and is acceptable to the parties hereto and that the same may be filed in this cause as the bill of exceptions herein and presented to the court and may be allowed, settled, signed and approved by the court at such time and place as the same may be presented by counsel for the defendants without further notice to the plaintiffs or other counsel and without their presence which is hereby waived.

This the 29 day of November, 1935.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for the Plaintiffs.
JULIUS MOSES,
Attorneys for the Defendant, Sam Howard.
LLOYD D. HETH,
WM. P. SMITH,
Attorneys for the Defendant, Continental Casualty Company.

380 IN THE DISTRICT COURT OF THE UNITED STATES.

Entered Nov. 29, 1935.

* * (Caption—44241) * *

ORDER APPROVING BILL OF EXCEPTIONS.

It appearing to the court that the foregoing bill of exceptions contains all of the material facts and proceedings occurring upon the trial of this cause and all evidence adduced at the same, together with exceptions thereto, and all of the material matters and things occurring upon the trial not otherwise of record in this cause, including the exhibits, and the parties hereto having stipulated and agreed upon said bill of exceptions and having duly acknowledged service and copy of the same; the court being duly advised, it is by the court

Ordered that said bill of exceptions be and it is hereby settled, approved and allowed as a true and correct bill of exceptions in this cause and the same is hereby certified accordingly by the undersigned United States District Judge of this court who presided at the trial of this case, as a true, full and correct bill of exceptions, and is hereby ordered made a part of the record in this case.

This the 29th day of November, 1935.

F. A. GEIGER,
United States District Judge sitting by special designation in this case.

381 O. K:

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for Plaintiffs.
JULIUS MOSES,
Attorney for Defendant, Sam Howard.
LLOYD D. HETH,
WM. P. SMITH,
Attorneys for Defendant, Continental Casualty Company.

Filed Jan. 10, 1936.

382 And on, to wit, the 10th day of January, 1936 came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Notice in words and figures following, to wit:

383 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

NOTICE.

To: George B. McKibbin, Walter E. Beebe, and Hamilton Beebe, Attorneys for the above named plaintiffs.

You and each of you are hereby notified that the defendants herein, Sam Howard and Continental Casualty Company, a corporation, complain of the rulings of the Court, the Verdict of the jury, the final judgment entered in this case on the 18th day of October, 1935, and the record and proceedings had in the above entitled cause in the United States District Court in and for the Northern District of Illinois; and

appeal from said judgment of said Court to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, and attach hereto a copy of their petition for appeal and assignments of error filed herein on the 10 day of January, A. D. 1936; and that they will present said petition for appeal and assignments of error to the Honorable Ferdinand A. Geiger, United States District Judge, sitting in this case by designation, in the United States District Court for the Northern District of Illinois, at the United States District Court room where said Judge presides in the Federal Building in the City of Milwaukee, Wisconsin, at 10 o'clock A. M., on the 10 day of January, 1936, and ask for the entry of an order in accordance with the prayer of said petition for appeal, allowing said appeal, fixing the amount of the appeal bond, and directing the approval of the appeal bond then to be presented, and that the filing of the same operate as a supersedeas in said cause and that further action on said judgment be stayed until a determination of said cause by the United States Circuit Court of Appeals for the Seventh Circuit.

This the 10 day of January, A. D. 1936.

SAM HOWARD,
By JULIUS MOSES,
Attorney.

CONTINENTAL CASUALTY COMPANY, a corporation,
By LLOYD D. HETH,
WM. P. SMITH,
Attorneys.

384 The above named plaintiffs, by their attorneys, hereby acknowledged receipt of service, on this 10 day of January, 1936, of the above notice of appeal, petition for appeal herein, and the assignments of error thereto attached, copy of the proposed order to be entered upon said petition, and consent that the same may be presented to Judge F. A. Geiger at the time and place stated in said notice.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON BEEBE,
Attorneys for Plaintiffs.

Filed Jan. 10, 1936.

385 And on, to wit, the 10th day of January, 1936 came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Petition for Appeal and Assignment of Errors in words and figures following, to wit:

386 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

PETITION FOR APPEAL.

The above named defendants, Sam Howard and Continental Casualty Company, a corporation, feeling aggrieved by the rulings of the Court, the verdict of the jury, the final judgment entered in this case on the 18th day of October, 1935, and the record and proceedings had in the above-entitled cause in the United States District Court in and for the Northern District of Illinois, do hereby appeal from said judgment of the United States District Court to the Circuit Court of Appeals for the Seventh Circuit of the United States, and submit and file herewith their assignment of errors and pray that this appeal be allowed, in accordance with the statute, rules and orders in such case made and provided, and that an order may be made fixing the amount of security which the defendants shall give and furnish upon said appeal in order to effect a supersedeas on said judgment, and that on approval of the same that it operates as a supersedeas and stay of the judgment rendered herein, and that citation issue as provided by law and that a transcript of the record, pleadings, proceedings, orders, decrees, judgment, papers and docu-

387 ments in this case, duly authenticated, be sent to the said United States Circuit Court of Appeals of the Seventh Circuit, sitting at Chicago, Illinois, under the rules of such Court in such cases made and provided.

Dated this 10th day of January, A. D. 1935.

SAM HOWARD,
By JULIUS MOSES,
Attorney.

CONTINENTAL CASUALTY COMPANY, a corporation,
By LLOYD D. HETH,
WM. P. SMITH,
Attorneys.

388 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Jan. 10, 1936.

* * (Caption—44270) * *

ASSIGNMENTS OF ERROR OF THE DEFENDANTS, SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION.

Now comes Sam Howard and Continental Casualty Company, a corporation, the defendants in the above entitled cause and say that in the record and proceedings therein there is manifest error in this, to-wit:

389 (1) The Court erred in permitting plaintiff's witness, Vincent A. Green, to testify for plaintiff, over the objection of defendants, to an eye-witness account of several "runs" on the Phillip State Bank & Trust Company, during the year and a half preceding the close of said Bank; said evidence being immaterial to the issues of the case and having a highly prejudicial effect upon a jury.

(2) The Court erred in permitting plaintiff's witness, Henry Feltes, to testify for plaintiff, over the objection of defendants, to seeing "runs" on said Bank prior to its close; said evidence being immaterial to the issues of the case and having prejudicial effect upon a jury, and not binding upon defendants.

(3) The Court erred in permitting plaintiff's witness, Vincent A. Green, to testify for plaintiff, over the objection of defendants, that during said period preceding said close of said Bank, people talked about the insolvency of said Bank; said evidence being immaterial to the issues of the case and having a highly prejudicial effect upon a jury.

(4) The Court erred in permitting plaintiff's witness, Louise M. Klein, to testify for plaintiff over the objection of defendants, that at that time, to-wit: April 15, 1931, she heard rumors about the insolvency of said bank and felt it would be safer to make such withdrawal; said evidence being immaterial to the issues of the case, having a highly prejudicial effect upon a jury and not binding upon defendants.

(5) The Court erred in permitting plaintiff's witness Margaret Key, to testify for plaintiff, over the objection of defendants, to hearing rumors of the insolvency of said bank

390 circulating throughout the neighborhood thereof during the period preceding its close; said evidence being im-

material to the issues of the case and having a prejudicial effect upon a jury.

(6) The Court erred in permitting plaintiff's witness, Henry Feltes, to testify for plaintiff, over the objection of defendants, to hearing rumors of insolvency of said Bank during said period; said evidence being immaterial to the issues of the case, having a prejudicial effect upon a jury and not being binding on the defendant.

(7) The Court erred in permitting plaintiff's witness, Louise M. Klein, to testify for plaintiff, over the objection of the defendants, that on April 15, 1931, she withdrew substantially all of her money she then had on deposit in said Bank; said evidence being immaterial to the issues of the case and having a prejudicial effect upon a jury.

(8) The Court erred in permitting plaintiff's witness, Amy Degerman, to testify for plaintiff, over the objection of defendants, to a withdrawal of $400.00 from said Bank on April 15, 1931; said evidence being immaterial to the issues of the case and having a prejudicial effect upon a jury.

(9) The Court erred in permitting plaintiff's witness, Catherine Goosens, to testify for plaintiff, over the objection of the defendants, that she withdrew money from said Bank prior to its close upon learning that there was a "run" there; said evidence being immaterial to the issues of the case, having a prejudicial effect upon a jury and not being binding on defendants.

391 (10) The Court erred in permitting plaintiff's witness, Margaret Kay, to testify for plaintiff over the objection of defendants, that on June 9, 1931, she withdrew all of her money on deposit in said Bank upon learning of a "run" on said Bank; said evidence being immaterial to the issues of the case and having a prejudicial effect upon a jury.

(11) The Court erred in admitting in evidence for plaintiff, over the objection of defendants, proof of the closing, from September 20, 1930 to June 18, 1932, of fifteen (15) banks located in the vicinity of said Phillip State Bank & Trust Company; said evidence being immaterial to the issues of the case and having a highly prejudicial effect upon a jury.

(12) The Court erred in permitting the plaintiff to introduce in evidence over the objection of defendants, headlines from leading Chicago newspapers of June 7th and 8th, 1931, announcing the merger of certain large banks located in the "loop" or business section of said city, viz: the merger of the Foreman Banks with the First National Bank, and the

National Bank of the Republic with the Central Republic Bank & Trust Company, said mergers being reported in said newspapers to have taken place in the interest of safeguarding depositors; said evidence being immaterial to the issues of the case, having no relationship with the then prevailing condition of said Phillip State Bank & Trust Company and having a prejudicial effect upon a jury.

(13) The Court erred in refusing to permit defendants' witness, Clarence A. Beutel, President of said Phillip State Bank & Trust Company in 1930, 1931 and 1932, to testify
392 for defendants of the circumstances under which said Phillip State Bank & Trust Company failed, the ruling of said Court being based upon the alleged immateriality of said testimony.

(14) The Court erred in refusing to permit defendants' witness, Clarence A. Beutel, to testify for defendants of the condition of said bank and the surrounding circumstances existing at the time of its close on June 21, 1932, the ruling of said Court in so refusing to permit said witness to testify being based on the alleged immateriality of said testimony.

(15) The Court erred in refusing to permit defendants' witness, Clarence A. Beutel, to testify for defendants of the existence and terms of an agreements entered into by said Phillip State Bank & Trust Company with a certain bank known as the Central Trust Company of Chicago, whereby said Central Trust Company undertook to advance to said Phillip State Bank & Trust Company, upon the security of its assets, any and all money needed by it to meet the "run" of June, 1932 upon said latter Bank, which "run" marked the closing of said Bank; the ruling of said Court in so refusing to permit said witness to testify being based upon the ground that there is no branch banking in Illinois and that no duty was imposed on the part of said Central Trust Company of Chicago to make said advance.

(16) The Court erred in refusing to permit defendants' witness, Clarence A. Beutel, to testify for defendants to a conversation of June 20, 1932, between said witness and the President of said Central Trust Company of Chicago, in
393 which the making of said advance referred to above in assignment No. 15 was discussed and agreed upon; the ruling of said Court in so refusing to permit said witness to testify being based upon the ground that there is no branch bank in Illinois and immateriality.

(17) The Court erred in refusing to permit defendants' witness, Clarence A. Beutel, to testify for defendants that the then officers of said Central Trust Company of Chicago repudiated said agreement referred to above in assignment No. 15 and that said repudiation precipitated the closing of said Phillip State Bank & Trust Company and was the direct and proximate cause thereof; the ruling of said Court in so refusing to permit said witness to testify being based upon the ground that there is no branch banking in Illinois, and that no duty was imposed on the part of said Central Trust Company of Chicago to make such advance, and of immateriality.

(18) The Court erred in permitting plaintiff to introduce in evidence, over the objection of defendants, column 4 of a certain statistical report marked for identification as Plaintiff's Exhibit 5, said column showing the amount of total deposits at the end of each month from August 31, 1930, to June 21, 1932, in said Phillip State Bank & Trust Company; said evidence being immaterial to the issues of the case, being unsupported by proof that the defendant, Sam Howard, knew thereof and not binding on defendants, and not reflecting the then stability of said bank because unsupported by proof of all other than assets and liabilities of said Bank.

(19) The Court erred in permitting plaintiff to introduce in evidence over the objection of defendants, column 5 of said Plaintiff's Exhibit 5 showing the percentage of the amount of total deposits at the end of each of the months, referred to above in assignment No. 18 borne by the amount of
394 bankruptcy estate deposits kept in said bank at the end of each of said respective months by the defendant, Sam Howard, as receiver or trustee in bankruptcy of the United States District Court for the Northern District of Illinois (said percentage ranging from 7.33 on August 31, 1930, to 19.83 on June 21, 1931); said evidence being immaterial to the issues of the case, being unsupported by proof that the defendant, Sam Howard, knew thereof and not binding on defendants, and of prejudicial effect upon a jury.

(20) The Court erred in permitting plaintiff to introduce in evidence over the objection of defendants, column 6 of said Plaintiff's Exhibit 5 showing the total amount of individual demand deposits in said bank at the end of each month from August 31, 1930, to June 21, 1932; said evidence being immaterial to the issues of the case, being unsupported by proof that the defendant, Sam Howard, knew thereof and not binding on defendant, and not reflecting the then stability

of said bank because unsupported by proof of all other then assets and liabilities of said bank.

(21) The Court erred in permitting plaintiff to introduce in evidence over the objection of defendants, column 7 of said Plaintiff's Exhibit 5 showing the percentage of the amount of individual demand deposits at the end of each of the months, referred to above in assignment No. 20, borne by the amount of bankruptcy estate deposits kept in said bank at the end of each of said respective months by the defendant, Sam Howard, as receiver or trustee in bankruptcy of said District Court (said percentage ranging from 13.98 on August 31, 1930, to 25.65 on June 21, 1931); said evidence being immaterial to the issues of the case, being unsupported by proof that the defendant, Sam Howard, knew thereof and not binding on defendants.

(22) The Court erred in permitting plaintiff to in-
395 troduce in evidence, over the objection of defendants, column 8 of said Plaintiff's Exhibit 5 showing the amount of cash and liquid assets in said bank at the end of each month from August 31, 1930, to June 21, 1932; said evidence being immaterial to the issues of the case, being unsupported by proof that the defendant, Sam Howard, knew thereof and not binding on defendants, and not reflecting the then stability of said bank because unsupported by proof of all other then assets and liabilities of said bank.

(23) The Court erred in permitting plaintiff to introduce in evidence, over the objection of defendants, column 9 of said Plaintiff's Exhibit 5 showing the ratio of said cash and liquid assets referring to above in assignment No. 22 to the then total deposits of said bank; said evidence being immaterial to the issues of the case, being unsupported by proof that the defendant, Sam Howard, knew thereof and not binding on defendants, and not reflecting the then stability of said bank because unsupported by proof of all other then assets and liabilities of said bank.

(24) The Court erred in permitting plaintiff to introduce in evidence, over the objection of defendants, column 10 of said Plaintiff's Exhibit 5 showing the ratio of said cash and liquid assets refer ed to above in assignment No. 22 to the amount of bankruptcy estate deposits kept in said bank by the defendant, Sam Howard, as receiver or trustee in bankruptcy of said District Court (said ratio ranging from 28.09 on August 31, 1930, to 74.21 on June 21, 1931); said evidence being

immaterial to the issues of the case, being unsupported by proof that the defendant, Sam Howard, knew hereof and not binding on defendants, and of prejudicial effect upon a jury.

396 (25) The Court erred in permitting plaintiff's witness, Marguerite Gilmore, to testify for plaintiff over the objection of defendants, that from August 1, 1930 until the year 1932, there existed in Cook County, Illinois, designated depositories of the District Court other than said Phillip State Bank & Trust Company; that the names of said depositories and the amounts of their respective bonds as originally filed with said Court and as thereafter increased from time to time were as follows: Central Trust Company, December 17, 1923—$50,000.00; June 9, 1931—$250,000.00; Chicago Bank of Commerce, May 7, 1930—$50,000.00; Chicago Trust Company, April 5, 1923, $50,000.00; Continental Illinois Bank and Trust Company, July 25, 1929—$50,000.00,

397 July 18, 1932—$250,000.00; Cosmopolitan State Bank, July 10, 1925—$100,000.00; Edgewater Trust & Savings Bank, March 6, 1930—$50,000.00, April 18, 1931—$20,000.00 cancelled; First National Bank of Chicago, November 9, 1898—$50,000.00, July 12, 1931—200,000.00; Harris Trust & Savings Bank, June 24, 1931—$50,000.00, June 24, 1932—$150,000.00; Jackson Park National Bank, April 15, 1924—$50,000.00; National Bank of the Republic, January 1, 1924—$50,000.00; Central Trust & Savings Bank, June 24, 1931—$250,000.00; Northern Trust Company, November 4, 1932—$250,000.00; Oak Park Trust & Savings Bank of Oak Park, Illinois, May 26, 1932—$50,000.00; Peoples Trust & Savings Bank, April 11, 1928—$50,000.00; Philip State Bank & Trust Company, August 20, 1930, $50,000.00; State Bank of Chicago January 16, 1924—$50,000.00; Strauss National Bank & Trust Company, July 3, 1930—$50,000.00; South Side Trust & Savings Bank of Chicago, January 25, 1929—$50,000.00 cancelled January 14, 1931; Transportation Bank of Chicago, January 15, 1930—$50,000.00; Union Bank of Chicago, January 24, 1930—$50,000.00; cancelled January 30, 1932; Union Trust Company, December 19, 1923—$50,000.00; Harris Trust & Savings Bank, June 26, 1931—$100,000.00; said evidence being immaterial to the issues of the case, raising an issue as to a supposed duty of the defendant, Sam Howard, during that period from August 1, 1920 to the close of said Philip State Bank & Trust Company, to exercise discretion in choosing

among said several depositories one in which to deposit
398 bankruptcy funds administered by him, which issue is at variance with that pleaded by plaintiff and failing in the issue so raised in that nothing is therein shown, nor was supporting proof offered, indicating the relative financial conditions of said several depositories as compared with the then condition of said Philip State Bank & Trust Company.

(26) The Court erred in refusing to admit in evidence for defendants, certain documents marked for identification as Defendants' Exhibit 33, said documents being reports made to said District Court in October, 1931, by receivers and trustees in bankruptcy of said Court, other than the defendant, Sam Howard, reporting the amounts of bankruptcy estate funds then kept on deposit by said receivers and trustees in designated depositories of said court, other than such Philip State Bank & Trust Company; and further in refusing to admit a certain compilation of said reports marked for identification as Defendants' Exhibit 34; both of said reports and compilation showing that at the time of the making of said reports the amounts of said bankruptcy estate funds then on deposit in said depositories exceeded the amount of the then respective bonds of said depositories as shown by plaintiff's evidence; the ruling of said Court in refusing to admit said reports and compilation being based on the alleged immateriality of said proof.

(27) The Court erred in refusing to permit the defendants' witness, Joseph A. Muir, to testify for defendants to a conversation had in late May or early June, 1931, some
399 time prior to June 11, 1931, between the Honorable George Carpenter, then Senior Judge of said District Court and the witness, then Chief Deputy Clerk of said Court, in which conversation said Judge discussed what depository bonds had been given by the various designated depositories of said Court, the respective amounts thereof, the amounts of bankruptcy estate funds then kept by receivers and trustees in bankruptcy of said Court in said depositories, and the then general banking situation in said district; said ruling of the court being based upon the alleged immateriality of said testimony and on the ground that the order entered thereafter by said Court on June 11, 1931 (said order being hereinafter set forth in assignment No. 28) would control and not said conversation.

(28) The Court erred in refusing to permit defendants' witness, Joseph A. Muir, to testify for defendants that sub-

sequent to said conversation between said witness and said Judge Carpenter, above referred to in assignment No. 27, said witness, as Chief Deputy Clerk of said Court, drafted an order pursuant to the request of said Judge which was duly entered on June 11, 1921 (said order is in evidence as Defendants' Exhibit 2, and is as follows: "It is hereby ordered that each and every receiver of this court is hereby ordered and directed to file with the Clerk of this Court a true and perfect financial statement of the amount of moneys deposited by him with the depositary banks of this Court on each first Monday of the third term of the United States District Court of this District, commencing July 1, 1931. Enter: Carpenter, Judge." 11th June 1931"); said ruling of said Court being based upon the alleged immateriality of said testimony.

400 (29) The Court erred in refusing to permit defendants' witness, Joseph A. Muir, to testify for defendants that in early June, 1921 prior to the entry of said order referred to above in assignment No. 28, said Judge Carpenter requested said witness, as Clerk of said Court, to communicate with the then various receivers and trustees in bankruptcy appointed by said District Court in which said Judge was sitting, and request them to file a statement or report of the total amount of bankruptcy estate funds then kept by said receivers and trustees, on deposit in the various designated depositories of said Court; said ruling of said Court being based upon the same grounds as those set forth above in assignment No. 27.

(30) The Court erred in refusing to permit defendants' witness, Joseph A. Muir, to testify for defendants that after said witness was requested by said Judge Carpenter, as set forth in assignment No. 29, said witness telephoned the defendant Sam Howard and informed him of said Judge's request; that on June 9, 1931, said defendant Sam Howard filed a statement or report with said witness (said statement or report being marked for identification as Defendants' Exhibit No. 1 and being hereinafter set forth in assignment No. 32), which thereafter was given and shown to said Judge and retained by him until his resignation; said ruling of said Court being based upon the same grounds as those set forth above in assignment No. 27.

401 (31) The Court erred in refusing to permit the defendant Sam Howard, to testify for defendants that in early June 1931 said defendant and said witness Muir as

Clerk of said District Court, held a telephone conversation in which defendant Sam Howard was told that said Judge Carpenter had directed that said defendant file with said Clerk a report of the amounts of bankruptcy estate funds kept in designated depositories of said court by said defendant as receiver or trustee in bankruptcy and that pursuant to said direction, said defendant filed his statement or report as set forth hereinafter in assignment No. (32); the ruling of said court being based upon the same grounds as those set forth in assignment No. (27).

(32) The Court erred in refusing to admit in evidence for the defendants a certain document marked for identification as defendants' Exhibit 1, said document being the statement or report of the defendant Sam Howard referred to above in assignments numbers (30) and (31) and stating the following:

"Sam Howard
Suite 816 National Republic Bank Building
134 South LaSalle Street,
Chicago.

June 9, 1931

Joseph A. Muir,
Chief Deputy Clerk,
United States District Court
Federal Building,
Chicago, Illinois,

Dear Sir:—

In compliance with your request, I am pleased to submit herewith the banks in which I have funds on deposit as receiver in the United States District Court.

Phillip State Bank & Trust Company $373,391.49
Foreman State National Bank..... 10,952.19

Yours very truly,
(Signed) SAM HOWARD."

the ruling of said court being based on the same grounds as those set forth above in assignment No. (27).

402 (33) The Court erred in refusing to permit defendants' witness, Celia M. Howard, Secretary to Judge Carpenter, in 1931, to testify for defendants that said letter or report of June 1931 above mentioned was received by her on behalf of Judge Carpenter; said ruling of said court being based on the alleged immateriality of said evidence.

(34) The Court erred in refusing to admit in evidence for defendants a certain document marked for identification as Defendants' Exhibit 4, said document being a compilation in writing made in the summer of 1931 by the then Secretary of said Judge Carpenter, at the request of said Judge and given to him, of reports theretofore made by the various receivers and trustees in bankruptcy appointed by said District Court, including those of the defendant, Sam Howard, and showing the amounts of bankruptcy estate funds then kept on deposit by said receivers and trustees in the designated depositories of said court, including the amount of bankruptcy estate funds, viz., $373,391.49 then kept on deposit by the defendant, Sam Howard, in said Phillip State Bank & Trust Company; said ruling of said court being based upon the alleged immateriality of said evidence.

(35) The Court erred in refusing to permit defendant's witness, Anne C. Pachucke, to testify for defendants as to the contents of a report made by the defendant, Sam Howard, on June 30, 1931, to said District Court, pursuant to said order of Judge Carpenter entered June 11, 1931, referred to above in assignment No. 28, said report showing the total amount of deposits of various bankruptcy estates then kept by said defendant as trustee or receiver with said Phillip State Bank & Trust Company; said ruling of said court being based upon the alleged immateriality of evidence.

(36) The Court erred in refusing to admit in evidence certain documents offered by the defendants marked
403 for identification as Defendants' Exhibits 31 and 32 (said documents being reports made in 1933 by said defendant, Sam Howard, as receiver or trustee in bankruptcy, of the amounts of bankruptcy estate funds then kept on deposit by said defendant in designated depositories of said District Court, and in refusing to permit said defendant, Sam Howard, to testify for defendants with respect thereto, said document and said testimony both being offered by defendants for the sole purpose of showing the form used by said defendant, Sam Howard, in making reports to said District Court pursuant to the order of Judge Carpenter on June 11, 1931, above set forth, said form allowing for reports of various amounts of bankruptcy estate funds kept on deposit by said defendant in said Phillip State Bank & Trust Company prior to its close; said evidence being refused on the ground of immateriality.

(37) The Court erred in refusing to permit defendants' witness, Charles M. Bates, to testify for defendants to a conversation or conversations occurring subsequent to June 11, 1931, between said witness, then Clerk of said District Court, and said Judge Carpenter, relating to the keeping of reports filed with said Clerk by receivers and trustees in bankruptcy pursuant to said order entered by said judge on June 11, 1931, above referred to; said ruling of said court being based upon the alleged immateriality of said evidence.

(38) The Court erred in refusing to permit said defendants' witness, Charles M. Bates, to testify for defendants to a conversation held in the middle of 1931 between the witness and said Judge Carpenter in which said witness, as Clerk of said Court, was directed by said Judge to file and bring or have brought to said Judge all reports filed with said Clerk by receivers or trustees in bankruptcy pursuant to said order of June 11, 1931, above referred to, and 404 showing the amounts of bankruptcy estate funds then kept on deposit for said receivers and trustees in the various depositories of said court; said ruling of said Court being based upon the alleged immateriality of said evidence.

(39) The Court erred in permitting plaintiff to introduce in evidence over the objection of defendants, plaintiff's Exhibits 7 and 8, showing respectively in summary form monthly deposits and withdrawals made by the defendant, Sam Howard, and balances remaining in two personal commercial banking accounts, namely the "Sam Howard Account" and the "Sam Howard Special Account" kept by the defendant, Sam Howard, with said Phillip State Bank & Trust Company from September 1930, until the close of said bank in June of 1932, (said balance in said "Sam Howard Account" ranging from $938.08 at the end of September 1930, to $4,017.60 at the end of March 1932, to $2,247.43 at the close of said bank, and the balance in said "Sam Howard Special Account" ranging from $25.28 at the end of August 1930, to $7,175.42 at the end of November 1931, to $3,606.20 at the close of said bank); said evidence being immaterial to the issues of the case and prejudicial in effect upon a jury.

(40) The Court erred in permitting plaintiff to introduce in evidence over the objection of defendants, plaintiff's Exhibit 10, detailing an account known as the "Sam Howard Indirect Liability as Endorser" account, kept by said Sam

Howard with said Phillip State Bank & Trust Company from December 1930, to June 1932, and showing in summary form 15 time obligations incurred during said period upon which said defendant was indirectly liable to said bank, the amounts credited from time to time against such obligations and the total balance owed from time to time (the total balance of said obligations ranging from $1028.61 on December 5, 1930, to $6,075.00 on February 8, 1932, to
405 $1,000.00 on June 7, 1932); said evidence being immaterial to the issues of the case and prejudicial in effect upon a jury.

(41) The Court erred in permitting plaintiff to introduce in evidence, over the objection of defendants, Plaintiff's Exhibit 9, detailing in summary form an account known as the "Sam Howard Loan Account" kept by the defendant, Sam Howard, with said Phillip State Trust & Savings Bank, from the middle of 1930 until the close of said Bank in June 1932, and showing the making of approximately thirty-six unsecured loans by said Bank to said defendant personally during said period, the amounts credited against and payments made of said loan from time to time, and the balance owed on account thereof from time to time (said balance ranging from $11,000. owed on September 10, 1930, to $17,500. owed at the close of said Bank in June 1932); said evidence being immaterial to the issues of the case and highly prejudicial in effect upon the jury.

(42) The Court erred in refusing defendants' offer to prove that the purpose for which said defendant, Sam Howard, borrowed the moneys referred to above in assignment No. 41 from said Phillip State Bank & Trust Company during said period was to make advances to the various bankruptcy estates then administered by him as receiver or trustee in bankruptcy in order to meet the administration expenses of said bankruptcy estates, such as custodian service fees, insurance, inventory service fees, bookkeeping service fees, mimeographing notices, stenographic service fees, etc.; said refusal of the Court to permit proof of such purpose being based upon the alleged immateriality of the proof so offered.

(43) The Court erred in making the following comments in the presence of the jury after the defendants had offered to show that the purpose for which the defendant, Sam Howard, borrowed the moneys referred to above in assignment No. 41, was to make advances to various bankruptcy estates

administered by him as receiver or trustee in bankruptcy
406 on account of estate expense as above mentioned in assignment No. 42: "Well, it is just an intolerable sort of thing: nobody could give any sanction to that sort of thing," and "The right of the trustee or receiver to be reimbursed for personal advances is quite different from the right to borrow money on his personal credit in order to assist him to finance that business. The Court has indicated this cannot be done by the trustee and cannot be done by the Bank. I indicated yesterday, and I will say it again, that personal loans made by Mr. Howard from the Bank and testified to yesterday, simply could not be made for the considerations that were then given"; to which comments the defendants duly excepted, said comments being highly prejudicial in effect upon a jury.

(44) The Court erred in refusing to permit the defendant, Sam Howard, to testify for defendants that he made personal advances to the various bankruptcy estates administered by him as trustee and receiver during the years 1930, 1931 and 1932 out of the moneys borrowed by him from said Phillip State Bank & Trust Company, as referred to above in assignment No. 42 and that he was reimbursed therefor out of the assets of said estates in the usual course of administration thereof upon order of the District Court approving his account or report, as receiver or trustee, to said Court; said ruling of the Court being based upon the alleged immateriality of said testimony.

(45) The Court erred in refusing to admit in evidence a certain document marked for identification as Defendants' Exhibit 7, together with vouchers and checks in support thereof, said evidence showing that cash advances were made personally from 1930 to the close of said Phillip State Bank & Trust Company by the defendant, to the various bankruptcy estates administered by him as receiver or trustee in bankruptcy, the funds of which estates were kept on deposit by said defendant in said Bank during said period and
specifically showing the dates and amounts of each of
407 said advances and showing that such advances were used by said defendant to meet items of administration or operation expense, to-wit, custodian service fees, insurance, drayage and hauling charges, inventory service fees, bookkeeping service fees, certification of court records and other papers, mimeographing notices, postage, telephone and stenographic fees, and showing the total of said advances as

being $12,541.20 and showing an amount still owing said defendant on account of such advances; the ruling of said Court being based upon the alleged immateriality of such evidence.

(46) The Court erred in striking, and refusing to admit testimony of defendants' witness, Anne C. Pachucke, offered for defendants and in refusing to permit the defendant, Sam Howard, to testify for defendants that the first loan in the sum of $7,000 made by said defendant, Sam Howard, in 1930 with said Phillip State Bank & Trust Company was made to pay a debt owed by said defendant to the Foreman State National Bank; that $2,500 of the second of such loans in 1930 was made to pay a debt owed the Central Trust Company; that both of said debts so paid had been incurred by said defendant in securing money to advance to various bankruptcy estates administered by him as receiver or trustee on account of estate expenses, and that he was later reimbursed for such advances upon order of the District Court; said testimony being stricken or refused in evidence by said Court on the ground of immateriality.

(47) The Court erred in refusing to admit in evidence, as immaterial, certain reports and documents filed in the District Court by the defendant, Sam Howard, as receiver or trustee in bankruptcy, and marked for identification as Defendants' Exhibits 8, 9, 10, 11 and 12, said reports and accounts being offered in connection with the testimony of defendants' witness, Anne C. Pachucke, to show the general
and approved form used during the years 1930, 1931 and
408 1932 by said defendant, Sam Howard, as receiver or
trustee in bankruptcy in making first, second and final reports and accounts to said District Court in the regular course of bankruptcy cases in which said defendant acted as such receiver or trustee, said general form containing as an item thereof and as a liability of the particular bankruptcy estate reported or accounted for, the amount of advances made by said defendant personally to said bankruptcy estate for estate expenses.

(48) The Court erred in refusing to permit defendants' witness, Anne C. Pachucke, and the defendant, Sam Howard, to testify for defendants to the existence of a general, well-known, uniform custom prevailing for at least ten years, in particular during the years 1930, 1931 and 1932 in the District Court of the United States for the Northern District of Illinois (said Phillip State Bank and Trust Company being a

designated depositary of said Court) for trustees and receivers in bankruptcy appointed by said Court, with the knowledge and approval of said court and its referees, to advance moneys out of their own individual funds to bankruptcy estates administered by them for the purpose of defraying estate expenses; said court so refusing on the ground that said evidence was immaterial.

(49) The Court erred in striking the following testimony of the defendant, Sam Howard, offered for defendants: "I did not get any personal benefit of any kind of reason of any loan made to me by the Phillip State Bank & Trust Company"; said testimony being stricken as a conclusion of the witness.

(50) The Court erred in not permitting defendants' witness, Anne C. Pachucke, to testify for defendants that from eight months to two years generally elapsed between the time that advances for estate expenses were made by the defendant, Sam Howard, to a bankruptcy estate administered him and the time reimbursement thereof would be made
409 to him upon order of said District Court; said ruling of said Court being based upon the alleged immateriality of said proof.

(51) The Court erred in refusing to permit Mr. Julius Moses, counsel for defendant, in his argument to the jury on behalf of the defendant at the close of all proof, to refer, as of common knowledge, to the general banking situation prevailing in the City of Chicago, in the district and in the country prior to and at the time of the closing of said Phillip State Bank & Trust Company although no proof of such situation was in evidence, and further erred in striking said portion of counsel's argument, to which rulings of said Court the defendants duly excepted; said argument of said counsel and the ruling of said Court thereon being as follows:

"Mr. Moses: 'How many millions of dollars do you suppose those receivers and trustees had in their custody at that time, as compared to this $400,000.00 that Mr. Howard alone had which he put into this bank? Why, gentlemen, you have a right to infer from this evidence, and from what you have seen in this case and what you know of conditions as they existed in 1931, that there were millions of dollars on hand in the depository.'

'Rumors are matters of common knowledge. You read the newspapers; you know what was talked about; you don't have to close your mind about what was going on and what was

being done and talked about, simply because you are jurors in this case.

'Against whom were the rumors directed, gentlemen? You know as well as I do. When the Insull collapses occurred in April, what banks—hark back to April, 1932, two months before this bank failed—what banks were rumors addressed against, within your common knowledge?'

The Court: 'Well, I don't believe this jury is privileged to discharge its duties in that way. The jury can't upon an appeal of counsel, go outside of the evidence and decide among themselves what recollection they have of other matters occurring three years ago, and allow them to proceed to discharge their duty in this case in that manner. It can't be done.' "

(52) The Court erred in refusing to permit Mr. Lloyd D. Heth, counsel for defendants, to make similar reference to the then banking situation as that made by Mr. Moses set forth above in assignment No. 51, proof of said situation not being in evidence, and further erred in striking said portion
410 of said counsel's argument, to which rulings of the Court defendants duly excepted; said argument of said counsel and said ruling thereon being as follows:

Mr. Heth: 'Oh, he wants to pick out the banks that stayed open, and say that "If Sam Howard put his money in those banks—look at it, men of the jury, he would have been safe" but tell me, did you know, did Sam Howard know in June of 1932 whether the First National Bank of the City of Chicago was going to remain open? Tell me that. We know it now, but how about then? As a matter of common knowledge, who didn't see the Loop of the City of Chicago thronged with frantic depositors.'

To which argument plaintiffs objected, which objection was sustained, to which ruling the defendants took an exception which was allowed.

Mr. Heth: 'Show me a bank where he could have put it, that it would have been safer, as it appeared at that time. Is there any evidence that if he had put his money in the First National Bank and had taken it all out in the first part of June, 1932, when he says that things were getting bad—if he had taken that money out and put it in the First National Bank of Chicago, what relation would Sam Howard's deposits in the First National Bank have borne to the depository bond of that bank?'

Thereupon the plaintiff objected to this argument as immaterial.

The Court: 'Well, I think you are getting outside the evidence.' ''

(53) The Court erred in refusing to give to the jury the following instruction requested by the defendants, and in refusing to embody the same or substance thereof in the charge given by the Court to the jury, and to hold (to which rulings defendants duly excepted), viz.: that the law did not impose upon the defendant, Sam Howard, the duty to investigate and ascertain the financial condition of the Phillip State Bank & Trust Company any time prior to the close of said Bank or to report such financial condition to the District Court, the evidence showing that at said time said Bank was a designated depository of said Court and was such depository continuously throughout said period.

(54) The Court erred in refusing to give to the jury the following instruction requested by the defendants, and 411 in refusing to embody the same or substance thereof in the charge given by the Court to the jury, and to hold (to which rulings defendants duly excepted) viz.: That there was no duty imposed by law upon the defendant Sam Howard to limit the amount of the deposits of bankruptcy estate funds made by him in the Phillip State Bank & Trust Company prior to the close of said bank, to the amount of $50,000.00, the amount of the depository bonds; the evidence showing that at the time of making said deposits and continuously thereafter until said close said bank was a duly designated depository of said Court.

(55) The Court erred in refusing to give to the Jury the following instruction requested by the defendants, and in refusing to embody the same or substance thereof in the charge given by the Court to the Jury, and to hold (to which rulings defendants duly excepted), viz., that no duty was imposed as a matter of law upon the defendant Sam Howard to ascertain the amount of bankruptcy estate funds deposited by receivers or trustees in bankruptcy of said Court other than said defendants, in the Phillip State Bank & Trust Company, or in any other depository of said Court, for the purpose of determining whether the total amount of such funds deposited by such trustees and receivers in any of said depositories exceeded the penalty of the bond required of such depository by the District Court as a condition to its becoming a depository of bankruptcy funds of said Court.

(56) The Court erred in refusing to give to the Jury the following instruction requested by the defendants, and in refusing to embody the same or substance thereof in the charge given by the Court to the Jury, and to hold (to
412 which rulings defendants duly excepted), viz., that it was the duty of the United States District Court for the Northern District of Illinois to investigate and ascertain the financial condition of each bank which made application to said Court to become a designated depository of bankruptcy funds and accordingly that it was the duty of said Court to investigate and ascertain the condition of said Phillip State Bank & Trust Company at the time it made application for such designation, and that it was likewise the duty of said Court to fix and determine the amount of the depository bond to be filed by said depository and that said District Court, as a matter of law, had power and the duty if at any time it determined that said Bank was unsafe, to revoke such designation or to raise the amount of the penalty of the depository bond required of said Bank.

(57) The Court erred in refusing to give to the jury the following instruction requested by the defendants, and in refusing to embody the same or substance thereof in the charge given by the Court to the jury, and to hold (to which rulings defendants duly excepted), viz.: that at the times when the defendant, Sam Howard, kept on deposit with said Phillip State Bank & Trust Company prior to its close the bankruptcy estate funds involved in controversy, there was in full force and effect a rule of the United States District Court for the Northern District of Illinois as follows:

"Payment of moneys deposited.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and counter-signed by the judge of the court or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be fur-
413 nished to the depository, and also the name of any referee or clerk authorized to countersign said check."

That by virtue of the foregoing rule of said Court, all moneys deposited by said defendant, Sam Howard, in said Phillip State Bank & Trust Company prior to its close for the various bankruptcy estates involved in this suit were subject to withdrawal from that Bank as depository, only in the event that the checks or warrants for such withdrawal were countersigned by the judge of said court or by a referee in bankruptcy of said court, or by the clerk or his assistant under an order made by the judge stating the date, the sum, and the account for which it is drawn; that by virtue of such rule all checks or warrants signed by said defendant, Sam Howard, as trustee or receiver in bankruptcy of said bankruptcy estates were required to be countersigned by the judge of said Court or by a referee in bankruptcy of said court, or by the clerk or his assistant under an order made by the judge stating the date, the sum, and the account for which it was drawn; said rule showing that such bankruptcy estate funds during the time they were on deposit in said Phillip State Bank & Trust Company were, as a matter of law, under the sole and absolute control of said District Court and subject to its exclusive power.

(58) The Court erred in refusing to give to the jury the following instruction requested by the defendants, and in refusing to embody the same or substance thereof in the charge given by the Court to the jury, and to hold (to which rulings defendants duly excepted), viz., that at the times when the defendant, Sam Howard, kept on deposit with said Phillip State Bank & Trust Company the bankruptcy estate funds involved in controversy there was in full force and effect an act of Congress as follows:

414 "Duties of Trustees.

(a) Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates;

* * * (3) Deposit all money received by them in one of the designated depositories;

* * * (4) Disburse money only by check or draft on the depositories in which it has been deposited;

* * * (8) Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

* * * (11) Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within

the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts;"
said statute showing that such bankruptcy estate funds during the time they were on deposit in said Phillip State Bank & Trust Company were, as a matter of law, under the sole and absolute control of said District Court of the Northern District of Illinois and subject to its exclusive power, and that the defendant, Sam Howard, owed no duty of care for conserving or preserving said bankruptcy estate funds while on deposit in said Bank, or that if such duty was then owed such statute and it provision was a fact to be considered in determining whether such duty was discharged lawfully.

(59) The Court erred in refusing to give to the jury the following instruction requested by the defendants, and in refusing to embody the same or substance thereof in the charge given by the Court to the jury, and to hold (to which rulings defendants duly excepted), viz.: that the United States District Court had the right and power at the time it designated said Phillip Sate Bank & Trust Company a depository of bankruptcy funds in the custody of said Court, to limit the amount of the deposits which might be received by said Bank from bankruptcy frustees or receivers, to the amount of the penalty of the depository bond required by said Court of said Bank as a condition to its designation as a depository;
415 the absence of such limitation relieving the defendant, Sam Howard, from any duty to restrict the amount of bankruptcy estate funds in controversy deposited by him in said Bank prior to its close to an amount less than the penalty sum of said bond; and further relieving said defendant in the event said defendant was then under duty as a matter of law to preserve such funds while on deposit, from any duty to regard the amount of said bond while making deposits in discharging such duty.

The Court erred in refusing to give to the jury the following instruction requested by the defendants, and in refusing to embody the same or substance thereof in the charge given by the Court to the jury, and to hold (to which rulings defendants duly excepted) viz.: that if Judge Carpenter was informed as to the amount of funds the defendant, Sam Howard, had on deposit in the Phillip State Bank & Trust Company and of the amount of the depository bond of said Bank, and if said Judge Carpenter, having such information, at no time revoked the order designating said Bank as a depository of bankruptcy funds nor raised the amount of the depository

bond of said Bank, then said defendant, Sam Howard, had the right to assume and believe in depositing the bankruptcy estate funds in controversy in said bank that in the opinion of the United States District Court in which said Judge Carpenter was sitting at that time said Bank as a designated bankruptcy depository of said Court was a safe place in which said defendant, Sam Howard, could continue to deposit said funds held by him as receiver or trustee in bankruptcy of said Court; the evidence showing that on June 11, 1931, said Judge Carpenter entered an order referring to above in assignment No. 28 directing all receivers and trustees of said District Court to file reports with the Clerk of the amount of moneys belonging to bankruptcy estates deposited by them in depositories of said Court, said reports to be filed every three months, and further showing that the defendant, Sam 416 Howard, complied with said order and reported the amount of bankruptcy estate funds deposited by him in said Bank up until the time of its close.

(61) The Court erred in refusing to give to the jury the following instruction requested by the defendants, and in refusing to embody the same or substance thereof in the charge given by the Court to the jury, and to hold (to which rulings defendants duly excepted) viz.: that there is no evidence in the record in this case proving or tending to prove that the said defendant, Sam Howard, failed to well, faithfully and truly account for all the moneys of the estates referred to in this cause which had come into his possession as receiver or trustees in bankruptcy.

(62) The Court erred in charging the jury as follows, to which charge defendants duly excepted:

"I do not know whether it is necessary at this time to give you an admonition that I gave to counsel during the discussion; and it is this: That in the consideration of these cases, you are to be concerned solely with the consideration of the evidence, determining what credit you will give to it, and where, upon fair and dispassionate consideration, it leads you, with respect to the determination of the one matter that is here in issue; namely, the conduct of the defendant Howard in the performance of his duty as either Trustees or Receiver, in the light of the obligation which the law placed upon him as a Trustee, or, as it is at times called, a fiduciary. • • • At the outset, gentlemen, you are considering here the obligations which the law places upon a Trustee, or, as I said a moment ago, a fiduciary, with respect to the care that he is to

bestow upon the conservation and the disposition of property of others entrusted to him for purposes of administration."

said above quoted portions of said charge in effect charging that a trustee or receiver in bankruptcy having bankruptcy estate funds on deposited in a designated depository holds such funds while so on deposit in a fiduciary capacity; whereas, as a matter of law, no fiduciary relationship or obligation exists in such a situation, and in further charging in effect that the defendant, Sam Howard, owed a duty of care in connection with the conservation of bankruptcy funds so on deposit; whereas no such duty exists where such funds are
417 deposited in a designated depository.

(63) The Court erred in charging the jury as follows, to which defendants duly excepted:

"At the outset, gentlemen, you are considering here the obligations which the law places upon a Trustee or, as I said a moment ago, a fiduciary, with respect to the care that he is to bestow upon the conservation and the disposition of property of others entrusted to him for purposes of administration. Under the law, that is a high duty, calling for the exertion by him of the highest good faith, and, so far as he is concerned personally, disinterestedness with respect to every other desire that he may have except the desire to discharge the trust."

said above quoted portions of said charge in effect charging that the defendant, Sam Howard, had the duty as a matter of law of exercising the highest good faith and disinterestedness in conserving the bankruptcy estate funds in controversy while said funds were on deposit in a designated depository, to-wit, the Phillip State Bank & Trust Company, whereas, as a matter of law, no such duty existed inasmuch as said funds were on deposited in a designated depository.

(64) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"The law, however, does not and is not to be taken by anyone as a guaranty by the Court of the solvency of the depositary for an unlimited period of time; nor as a warrant to a trustee or a receiver to relax or to ignore a duty otherwis resting upon him to act in case of actual danger with respect to the designated depository.

In other words, although the Court under this law designates these depositories, the Trustees or the Receiver is none the less obliged to take note of anything that may affect the prudence and the care of continuing on his part to recognize

such a depository; and in no event is he privileged, in the face of facts which challenge the propriety of continuing, the safety of continuing the use of that depository—in no event is he allowed to ignore such a situation, and merely continue to deposit on the assumption that the Court will find out in its own way, from time to time, whether or not such a depository should be used, whether the Trustee or Receiver in fact thinks it should be or not."

418 said above quoted portions of said charge in effect charging that the defendant, Sam Howard, as trustee or receiver in bankruptcy or any other trustee or receiver in bankruptcy making or keeping deposits of estate funds in a dsignated depository as, to-wit, said Phillip State Bank & Trust Company, cannot as a matter of law rely upon the designation of said depository in the event prudence and care on the part of said receiver or trustee challenge the continued use of said depository for such purpose, whereas no prudence or care are required as a matter of law if the funds are deposited in a designated depository; said portion of said charge in effect charging that the Court merely designates its depositories, whereas, it is the duty of the Court to supervise and control funds deposited in depositories; and to make inquiry into the condition of said depositories from time to time, and, as shown in the evidence, the District Court for the Northern District of Illinois entered an Order upon all receivers and trustees in bankruptcy, of said Court, to report to said Court, in quarter annual periods, after June 11, 1931, the amounts of bankruptcy funds kept by them on deposit in the depositories of said Court; and said portion of said charge further charging that a trustee or receiver in bankruptcy cannot rely upon the assumption that the Court will find out, from time to time, the condition of its designated depositories; whereas, it is the duty of said Court to make such inquiry and a receiver or trustee in bankruptcy can rely upon such inquiry having been made.

419 (65) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"Coming now to a matter of practice and procedure, the bankruptcy law makes some provision for the deposit and for the care of funds coming to bankruptcy functionaries, by endowing the court, empowering it with the duty of designating depository banks. That is what it comes down to."

whereas the statutes provide in addition as above set forth in assignments Nos. 57 and 58 for the supervision and control of

bankruptcy funds deposited in designated depositories, and the direction thereof, by the Court.

(66) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"I would say to you that the mere deposit of a sum in excess of that is not, standing alone, necessarily negligence. But, when a Trustee or receiver knows that, so far as the particular depository is concerned, it has given a bond which affords protection or security for a specified amount; then a trustee or a receiver should, in prudence, take note of the fact whether the deposits which he is making greatly exceed the amount of the surety bond thus given."

said above quoted portions of said charge in substance charging the jury that a trustee or receiver in bankruptcy, making or keeping deposits of estate funds in a designated depository is required under law as a matter of prudence to observe whether the amount of such deposits greatly exceed the amount of depository bond given by said depository, and
420 if said deposits do exceed said bond, whether it is proper to continue making or keeping such deposits in said depository, whereas, as a matter of law, no such duty exists if the Bank is a designated depository.

(67) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"And therefore, in this connection, the plaintiff has brought to the attention of the court evidence respecting the deposit of funds by the defendant Howard as Trustee or Receiver, in the designated bank, the Phillips State Bank, which is the bank here under inquiry, in an amount greatly in excess, from the very start, of the amount of a surety bond given by that depository.

"I would say to you that the mere deposit of a sum in excess of that is not, standing alone, necessarily negligence. But, when a trustee or receiver knows that, so far as the particular depository is concerned, it has given a bond which affords protection or security for a specified amount; then a trustee or a receiver should, in prudence, take note of the fact whether the deposits which he is making greatly exceed the amount of the surety bond thus given.

"And therefore the duty of the trustee in that connection may arise, and in my opinion it does arise in this case, the question as to the duty, in connection with the other evidence in the case respecting the history of the bank, respecting its progress throughout the year and a half that is here under

review; to the end that we may ascertain whether in that history there arose facts which, coming to the knowledge or notice of the trustee or receiver, challenged the propriety of his continuing to deposit, and to leave there amounts greatly in excess of the security bond given by the depository.

"And you have a right to take this evidence, and ought to take it, to consider whether, under the circumstances of this case, the deposit of these various amounts, the continued maintenance of deposits greatly in excess of the amount of the security bond given by the depository, constituted a want of reasonable care, a want of prudence by the defendant Howard, who was required to exercise a high degree of prudence and care in order to safeguard the funds entrusted to him in either capacity, as receiver or trustee."

said above portions of said charge in substance charging that a trustee or receiver in bankruptcy as well as the defendant, Sam Howard, in making or keeping bankruptcy estate funds on deposit in a designated depository such as said Phillip State Bank & Trust Company is bound by "notice" and not merely knowledge of facts surrounding the making or keeping of said funds so on deposit; whereas such receiver 421 or trustee, if bound at all, is bound only by knowledge of the facts; and further in substance charging that the defendant, Sam Howard, was under a duty to exercise a high degree of prudence and care in making or keeping said funds on deposit in said bank in excess of the depository bond of said bank, whereas, as a matter of law, no such duty existed, the evidence showing that said bank was a designated depository of said District Court and that no order restricting deposits of receivers or trustees in said bank had ever been entered; and further in substance charging that the jury should consider as a circumstance the fact that the defendant, Sam Howard, continued in maintaining deposits of bankruptcy funds in said bank greatly in excess of the amount of depository bond of said bank, whereas such fact was immaterial for the reasons in this assignment above set forth; and further in singling out the fact that said deposits exceeded said bond and thereby laying undue emphasis on said fact; whereas said fact, if at all important, was to be considered merely as one of the circumstances of the case; and further in substance charging that the defendant, Sam Howard, was required to exercise a high degree of prudence and care in order to safeguard the funds entrusted to him as receiver or trustee and deposited in said bank, whereas the pending suit is

upon certain bonds given by said defendant, the condition whereof being that "if the said Sam Howard, trustee as aforesaid, shall obey such orders as said court (United States District Court for the Northern District of Illinois) may make in relation to said trust, and shall faithfully and truly account for all moneys, assets, and effects of the estate of said bankrupt, which shall come into his hands and possession and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue."

422 (68) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"I come to the consideration of another matter that has been referred to here in the discussion, and is, in my judgment, a somewhat outstanding matter upon the evidence. And that is the evidence that deals with the manner in which the relationship of the defendant Howard and the bank arose; what was said and done at that time, in the way of creating an understanding or a sort of a condition upon which he entered as a depositor of the bank.

"And, while you must recall the testimony, I say it was in substance this: That the arrangement was entered into upon the promise and undertaking, in substance, by the bank, that if the defendant Howard would deposit his trust funds in that bank, he would have a certain personal credit; and I think the testimony is rather clear that, practically concurrently, within a day or so of his relationship, if not before, he was granted a very considerable personal loan, by the bank, the Phillips State Bank. That it was thereafter continued, and continued with the exception of the repayment of about $1015—$150, throughout the entire period of his depositing funds in the bank.

"I say to you, gentlemen, that that sort of an arrangement, whereby the person of the trustee is allowed to come into transactions personal to himself—and that is what these loans were, no matter how he wanted to use the money—that that sort of a bargain, if I can so call it, that sort of an admixture of his personal desires with his trust obligations, is utterly repugnant to what the situation permitted; not only under the law, but upon any sort of a test of propriety permitted either to the bank or to the trustee.

"Now, the importance of that in this case comes about in this way: It is the consideration by of the effect of that sort of an arrangement and understanding upon the discharge of

trust obligations. And I say to you that it was improper, for the reason that it fettered, if I may use that term, the trustee or functionary in discharging his trust obligations."

said above quoted portions of said charge singling out as a fact for comment and laying emphasis upon the arrangement between the defendant, Sam Howard, and said Phillip State Bank & Trust Company for the making of loans by said bank to said defendant in the years 1930, 1931 and 1932 prior to the close of said bank, said arrangement being referred to above in assignments No. 41-49, inclusive, whereas if said defendant owed a duty of care to preserve the bankruptcy estate
423 funds in controversy while on deposit in said bank as a designated depository, the making of said loans was immaterial to the issue of whether said defendant discharged said duty, and the singling out of such fact was highly prejudicial in effect upon the jury; and further said portions of said charge in effect charging that said loans were in violation of law and improper, whereas no such violation or impropriety appertained, and further in charging that the purpose for which said loans were made was immaterial, whereas if the evidence of said loans was admissible in the case the purpose for which said loans was made bore upon the good faith of said defendant, Sam Howard, and the lawfulness of his conduct in discharging said duty.

(69) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"He could not with singleness of devotion regard the trust funds as being subject to his conservation upon appeal to what was prudent, for the reason that he was obligated to the bank in a personal way; which obligation concurred with, and, as I said a moment ago, was admixed with the trust obligation, so that the discharge of the trust obligation brought before him the necessity of his discharging his personal obligations.

"And therefore, this fact being determined, as I think it should be determined, of the character in law that I have just characterized it, bears importance upon the situation in which the defendant Howard was left, and in which he found himself from time to time, in interpreting things that occurred, the mere occurrence of which bore pertinently and necessarily upon the fact as to the condition of that bank, and his own view of it, and the course that he should pursue in respect of further continuing as a depositor, either as trustee or receiver."

said above quoted portions of said charge stressing as an important fact for the jury to consider in connection with the loans to said defendant, Sam Howard, referred to above in assignment No. 68 and the discharge by said defendant of the supposed fiduciary duty resting upon him in connection therewith as charged by the Court and set forth above in as-
424 signments No. 62 and 63, the fact that said loans were personal obligations of said defendant, whereas such fact was immaterial and the comment thereon highly prejudicial in effect upon the jury; said quoted portions of said charge stating that the obligation of said defendant under said loans was admixed with the trust obligation, whereas no evidence was offered nor introduced showing such admixture, nor is such admixture, if a fact, at all material in considering said supposed fiduciary duty; said charge in substance charging the jury that in determining whether defendant, Sam Howard, had lawfully discharged said supposed duty to regard the condition of said Phillip State Bank & Trust Company in making deposits of bankruptcy funds in said bank (the court being in error in assuming and charging the existence of such a duty) that the jury should keep in mind that the defendant, Sam Howard, because of said loans found himself in situations from time to time requiring his decision whether he should leave said bankruptcy funds on deposit in said bank and whether he should continue as a depositor thereof, of said bank, and that the decision or decisions made by said defendant in connection therewith was affected adversely by said arrangement for and existence of said loans.

(70) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"In other words, these matters—and it is for you to remember the testimony, but as my recollection serves me, they came to Mr. Howard's attention for the first time in a rather decided manner as early as April, 1931, through a run which was found to have developed on the bank. You will remember the testimony regarding the seriousness of it. That was followed by a run in June, in September, and at or about the holidays of that same year; with a subsequent run the following year, resulting in the closing of the bank.

"Now, gentlemen, take this proof and consider it in the manner in which I have indicated, by asking yourselves the question:

"How should these proofs have impressed a reasonably

prudent man, having no desire other than to safeguard and to conserve, with a singleness of devotion to the trust obligation, how should they have impressed Mr. Howard during this period of time, with respect to the course that he should pursue?"

425 said above quoted portions of said charge singling out for comment the seriousness of the run upon said Phillip State Bank & Trust Company in April 1931 and the subsequent runs upon said bank, whereas the evidence thereof was incompetent and immaterial and not to be considered by the jury for the reason that said bank was at said times a designated depository of the District Court of the United States for the Northern District of Illinois.

(71) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"Now, if, upon a careful survey of all of this evidence, you feel that this bank was in a safe condition, and that there was nothing there that indicated the necessity of regarding it as involving hazards, great hazards to the trust funds, and that the defendant Howard knew of nothing that would challenge his right to continue not only to deposit, but to increase the deposits in the light of all the evidence here, as developed, your verdict in this case should be for the defendants."

said portion of said charge being the only portion wherein the jury was instructed on what conditions they were to find for the defendants and charging in substance that the jury could find for defendants only if the jury felt from all the evidence in the case that the following facts or conditions coexisted and were true (a) that the Phillip State Bank & Trust Company was in a safe condition; (b) that there was nothing which indicated the Bank as involving great hazards to trust funds, and (c) that the defendant, Sam Howard, knew of nothing that would challenge his right to continue to deposit and increase his deposit in said Bank; whereas the jury should have been instructed to find a verdict for the defendants for the reason that said Phillip State Bank & Trust Company was a designated depository of said District Court and that no duty of care was owed by the defendant, Sam Howard, in connection with the deposit of the bankruptcy funds in controversy in said bank and furthermore, assuming that a fiduciary duty was owed by said defendant in connection therewith, the defendants were not liable unless a violation of

426 said duty was shown by a preponderance of the evidence and in this connection the co-existence of the facts

stated in sub-paragraphs (a), (b) and (c) of this assignment or the existence of any of them was not the issue for the jury to consider; said portions of said charge above quoted charging by implication that unless the jury found the facts specified in said sub-paragraphs (a), (b) and (c) the jury was to find for the plaintiff, whereas a finding thereon was immaterial and on the issue of reasonable care the preponderance had to be established by plaintiff; and said charge in effect directing a verdict for the plaintiff.

(72) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"If, on the other hand, you are satisfied that this bank throughout the period that is here under view had become a hazardous place to have trust funds, and taking into consideration what the defendant Howard knew about that,—and you have a right to go through the whole body of the evidence and determine what facts he knew respecting the condition of that bank; such facts as he would learn from an examination of the reports; such facts as he could infer from the circumstances that the officers of the bank themselves had concern respecting its ability to discharge its obligations to creditors; and in that connection I want to say to you that those facts must be the facts that deal with the condition of the bank; and if, as is true, it was stated by men connected with other banks that they might or would stand back of it, that those things were communicated to Howard with the idea of indicating a hopefulness on the part of those who communicated those facts to him; those facts, none the less, did not change the condition of the bank, nor alter the duty which the law imposed upon the defendant Howard in respect of those funds."

said portion of said charge above quoted in effect charging that in determining whether the defendant, Sam Howard, had lawfully discharged the supposed duty resting upon him as charged by the Court and set forth above in assignments No. 62 and 63 to regard the condition of the Phillip State Bank & Trust Company during the period in controversy (the court being in error in assuming and charging the existence of such a duty) the jury could not consider as affecting the condition of said bank, the representations
427 of the officers of both said Bank and the Central Trust Company of Chicago, as shown by the evidence, that said Central Trust Company of Chicago would lend the money necessary to support said Phillip State Bank and Trust Company

in meeting any contingency affecting the solvency of said Bank, even though a reasonable prudent man under such circumstances could have relied upon such representations in discharging said supposed dufy; said portion of the charge purporting to state the facts the jury were to find, in order to render a verdict for the plaintiff, whereas such facts did not so constitute the basis upon which the jury could find for the plaintiff; said charge in connection with the charge above quoted in assignment No. 71, in effect directing a verdict for the plaintiff, and further failing to charge the jury that unless the jury found from a preponderance of the evidence that the issues in the case were with the plaintiff, the jury was to find for the defendants.

(73) The Court erred in charging the jury as follows, to which charge the defendants duly excepted:

"The plaintiff suing here is the successor trustee, who, I venture to say, has no large personal interest in the matter. So far as the defendants, or either of them, are concerned, they have a deep and somewhat abiding interest in the result of this lawsuit, that may affect them or the witnesses who appeared here on their behalf, in the giving of their testimony."

and in commenting upon the exception of defendants to such charge, to which comment defendants duly excepted:

"The Court: 'No, now, wait a minute. Yes, the plaintiff has a large interest but my suggestion was that the plaintiff couldn't have a deep personal interest in this suit. * * * Well, he is suing in the relation of a trustee. I understand (that the plaintiff is the United States of America). I think I am justified in saying that on the trial of this case there was no deep personal interest manifested on the part of anybody named Willoughby. The United States, through him, is seeking recovery on the bonds.

428 said portion of said charge and said comment upon said exception in effect charging the jury that the plaintiff had no concern in the suit and was disinterested, whereas the interest of said plaintiff entitled his witnesses to no greater weight than those appearing for the defendants and the defendants; and further, in effect, charging that the United States was the party plaintiff to the suit and concerned with enforcing in the interest of the United States said bonds, whereas the United States is no such party plaintiff and has no such interest.

(74) The Court erred in its charge to the jury in that the effect and substance of the general charge was tantamount to

a peremptory instruction to the jury, to find the issues with the plaintiff and return a verdict in the plaintiff's favor.

(75) The Court erred in submitting to the jury forms of verdict covering the entire amended complaint in case No. 44241, instead of submitting forms of verdict on each separate county of said complaint; to which ruling of the Court the defendants duly excepted.

(76) The Court erred in submitting to the jury forms of verdict containing the amounts for which the jury should return such verdict, if the jury found the issues for the plaintiff.

(77) The Court erred in overruling the motion of defendants, at the close of all proof in the case, that the Court exclude the evidence from the jury for the reason that it failed to establish the allegations, or any of them, of the complaint as amended.

429 (78) The Court erred in overruling the motion of defendants at the close of all proof, that the Court exclude the evidence in the case from the jury, for the reason that the defendant Sam Howard was under no duty or obligation, as a matter of law, to perform any of the acts alleged and complained of in the complaint as amended upon which the causes of action are based.

(79) The Court erred in submitting the case to the jury.

(80) The Court erred in overruling the motion of the defendants, at the close of all proof, that the Court direct the jury to find the defendants and each of them not guilty.

(81) The Court erred in overruling the motion of defendants, at the close of the case, that the Court enter a judgment in favor of said defendants and against said plaintiff, non obstante veredictor, to which ruling of said Court defendants duly exeepted.

(82) The Court erred in overruling the motion of the defendants and each of them, at the close of the case, in arrest of judgment, to which ruling of the Court the defendants duly excepted.

(83) The Court erred in entering judgment upon the verdict of the jury in favor of the plaintiff and against the defendants, to which action of the Court the defendants and each of them duly excepted.

430 (84) The Court erred in overruling the several motions of the defendants, and each of them, in substance as hereinafter stated, to dismiss the complaint, as amended, and each and every count thereof (which motions were in

form and substance the same except as to the description of the bond in each count), and in requiring the defendants to answer the same. Each count of the complaint, as amended, charges the appointment of Sam Howard as trustee in certain estates in bankruptcy, and the giving of a trustee's bond containing the following condition:

"Now, Therefore, if the said Sam Howard, Trustee as aforesaid, shall obey such orders as said Court may make in relation to said trustee, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said Bankrupt, which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise, to remain in full force and virtue."

that as such trustee he deposited his funds of said estates in the Phillip State Bank & Trust Company, a duly designated depositary of bankruptcy funds, together with funds held by him as trustee and receiver in other estates in bankruptcy; that the total deposits made by him in all estates in which he was receiver and trustee was unreasonable and in excess of the depositary bond of $50,000 given by said Bank; that such deposits during the month of August, 1930, commencing August 25, 1930, amounted to $249,533.32 and varied from month to month from $241,447.26 to $416,833.90, which latter amount was on deposit in said Bank at the time of its closing; that Howard borrowed personally from said Bank on his unsecured note so that when the Bank closed his loans amounted to $17,500; that at the time when Howard made his first deposit as receiver and trustee of $249,533.32 in said depositary, said depositary was a small outlying Bank
431 with total deposits of $3,401,014.29; that the total individual demand deposits were but $1,784,379.15; that the total Government bonds, due from banks, and cash, was but $888,392.89; that Howard's deposits as receiver and trustee increased by November, 1930, to $390,932.47, and by June 21, 1932, the date when the Bank closed to $416,833.90, at which time the total bank deposits were but $2,101,701.51, and Government bonds and cash due from other banks were but $561,721.56; that between the time of the said first deposit and the Bank's closing there were heavy withdrawals from the Bank, its capital became impaired, it had other financial difficulties, of which facts Howard had notice; that during all of such times Howard negligently, carelessly and improperly deposited in the Bank, in his name as receiver and trustee of

bankrupt estates, an unreasonably large amount of money, especially in view of the fact that the Bank's depositary bond was only $50,000; that Howard, notwithstanding said facts and his notice thereof, negligently and carelessly permitted said moneys to remain on deposit and continued to make deposits when ordinary care and prudence would have required him to limit his deposits to an amount not to exceed $50,000; that he did not faithfully discharge the duties of his trust, did not well and truly account for the moneys in his possession, did not report to the court in writing the condition of the estates, moneys on hand, including the initial deposit, the condition of the Bank as to the amount of total deposits, proportion of his deposits to the total deposits, nor his additional deposits, with information as to the condition of the Bank, nor the increases in his deposits at the time when the total deposits in said Bank decreased, nor the heavy with-
432 drawals from the Bank and decreases in total deposits therein, nor its unsafe condition by reason thereof, nor that he had obtained personal loans from the Bank, nor that his personal loans increased from time to time as its deposits decreased. The complaint, as amended, and each count thereof was wholly insufficient as a matter of law, for the reasons set forth in said motions to strike, as follows:

(a) None of said counts in said amended complaint show that at any time the terms and conditions of the trustee's bond were breached.

(b) There was no averment in the said complaint, as amended, or any count thereof, that there were other depositories in bankruptcy in said District, than the Phillip State Bank & Trust Company, nor that said bankruptcy funds could have been deposited in any other bankruptcy depositary with greater safety and security; that the condition of other designated depositaries generally and particularly with reference to the comparative amount of their demand deposits, cash, bonds, withdrawals, proportion of deposits to trustees and receivers deposits, and other matters alleged in the complaint, as amended, was better or safer or more secure than that of the Phillip State Bank & Trust Company.

(c) There is no allegation or showing in said complaint, as amended, or any count thereof, nor can it be reasonably inferred therefrom, that any of the matters and things therein alleged were responsible for, contributed to, or were the proximate cause of the loss of the funds in question.

(d) Said complaint, as amended, and each count thereof,

failed to allege any facts sufficient in law to show that Howard failed to faithfully perform all his official duties as trustee.

433 Wherefore, the said defendants, Sam Howard and Continental Casualty Company, a corporation, pray that the judgment of the said District Court of the United States for the Northern District of Illinois, be reversed without remanding the said cause to said Court or (if said judgment be not reversed without remanding as prayed), that said judgment be reversed and this cause be remanded to the said Court with instructions to arrest the judgment upon the verdict and to enter judgment upon the pleadings in said cause in favor of the said defendants and against said plaintiff notwithstanding the verdict herein as prayed, or (if said judgment be not reversed without remanding, or reversed with directions to said court to arrest the judgment herein, on the verdict, and to enter judgment on the pleadings in favor of said defendants and against said plaintiff, notwithstanding the verdict, as prayed) that said judgment be reversed and this cause be remanded to the said Court with instructions to grant said defendants a new trial in said cause.

SAM HOWARD,
CONTINENTAL CASUALTY COMPANY,
a corporation,
By JULIUS MOSES,
LLOYD HETH,
WM. P. SMITH,
Their Attorneys.

434 And afterwards, to wit, on the 10th day of January, 1936, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable F. A. Geiger District Judge appears the following entry, to wit:

ed.
n. 10, 1936.

435 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

ORDER ALLOWING APPEAL, FIXING AND APPROVING BOND.

Upon motion and petition for appeal of the defendants, Sam Howard and Continental Casualty Company, a corporation, by their attorneys of record herein, Julius Moses, Lloyd Heth and William P. Smith, which said petition for appeal, accompanied by the defendants' Assignments of Error has been duly filed herein,

It Is Ordered: that the appeal to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, from the final judgment and decree heretofore filed and entered herein in this cause on October 18, 1935, be and the same is hereby allowed to the defendants, and each of them, upon the filing and approval by this court of the defendants' appeal bond, conditioned according to law, to be filed by said defendants in this cause, in the penal sum of Two Hundred Seventeen Thousand Dollars ($217,000.00).

And it appearing that said appeal bond in said sum of
436 Two Hundred Seventeen Thousand Dollars ($217,000.00) with good and sufficient security thereon, is now tendered to this court for approval in open court.

It Is Further Ordered that the said appeal bond so tendered be and the same is hereby approved and filed herein, and that the same operate both as a supersedeas bond and as a bond for costs and damages on appeal, and that all further proceedings upon said judgment be suspended and stayed until a determination of the said appeal by the United States Circuit Court of Appeals in and for the Seventh Circuit.

And It Is Further Ordered that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings in this cause, be prepared by the Clerk of this Court and filed in the said Circuit Court of Appeals in and for the said Seventh Circuit, as required by law and the rules of this Court.

F. A. GEIGER
United States District Judge.

Dated Jan. 10, 1936.
O. K. as to form.

GEORGE B. McKIBBIN
WALTER E. BEEBE

437 And on, to wit, the 10th day of January, 1936 came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Supersedeas Bond in words and figures following, to wit: Filed Jan. 10,

438 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—44241) * *

APPEAL-SUPERSEDEAS BOND.

Know All Men by These Presents, That we, Sam Howard and Continental Casualty Company, a corporation, as principals, and National Casualty Company, as surety, are held and firmly bound unto the United States of America, on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al., in the penal sum of Two Hundred Seventeen Thousand Dollars ($217,000.00), conditioned as follows:

Whereas, the said Sam Howard and Continental Casualty Company, a corporation, have prayed for and been granted an appeal from the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, at Chicago, Illinois, in the case in said court wherein the said United States of America, on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al., are plaintiffs, and the said Sam Howard and Continental Casualty Company, a corporation, are defendants, for review of said judgment in the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, Illinois, said judgment being for One Hundred Ninety-Seven Thousand Seventy-Six Dollars and 31/100ths ($197,076.31), and interest from date of entry and costs; and whereas a citation directing the said United States of America, on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al., citing them to appear before said United States Circuit Court of Appeals, according to law, within thirty days from date has been issued and service thereof duly made and acknowledged.

439 Now, Therefore, the condition of the above obligation is that if the said defendants, Sam Howard and Continental Casualty Company, a corporation, herein named as principals in this bond, shall prosecute their appeal to effect

and shall answer for all damages and costs if they fail to make their plea and appeal good; then the above obligation to be void; otherwise to remain in full force, effect and virtue, the payment of which is to be levied out of the goods, chattels, lands and tenements of the parties herein obligated.

In Witness Whereof, we have on this the 10th day of January, 1936, hereunto affixed our signatures and seals.

SAM HOWARD, *principal*
By SAM HOWARD (signed)

CONTINENTAL CASUALTY COMPANY, a corporation, *Principal*
By ROY TUCHBREITER (signed)
Vice President.

(Seal)

Attest:
By MAX WALLACE (signed)
Assistant Secretary.

NATIONAL CASUALTY COMPANY, *surety*
By W. E. KRAFFT (signed)
Attorney-in-fact.

(Seal)

Attest:
By R. D. WEILBRENNER (signed)
Assistant Secretary

Countersigned:
By P. O. OLSTAD (signed)
Resident Agent.

Approved:

.....
United States District Judge sitting by designation.

Certificate.

I, R. D. Weilbrenner, Assistant Secretary of the National Casualty Company, do hereby certify that the attached Power of Attorney dated July 1st, 1935, in behalf of W. E. Krafft, is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this 10th day of January, 1936.

R. D. WEILBRENNER (signed)
Assistant Secretary.

O. K.
GEORGE B. MCKIBBIN
WALTER E. BEEBE

440

National Casualty Company
Casualty and Surety Administrative Office
W. G. Curtis, President
Chicago, Ill.

Certificate of Authority Individual Attorney-in-Fact.

Know All Men by these Presents, That the National Casualty Company, a corporation duly organized under the laws of the state of Michigan, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint W. E. Krafft of Chicago, Illinois its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature subject, however, to the following conditions and limitations: None and to bind the National Casualty Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of the National Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given, are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 1st day of October, 1927.

"Article X—Surety Bonds and Undertakings.

Section 2. Appointments of Attorneys-in-Fact. The President or any Vice President may, from time to time, appoint by written certificates Attorneys-in-Fact to act in behalf of the Company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice President or the Board of Directors may at any time revoke all power and authority previously given to any Attorney-in-Fact."

In Witness Whereof, the National Casualty Company has caused these presents to be signed by its Vice President and

its corporate seal to be hereto affixed this 1st day of July, 1935.

NATIONAL CASUALTY COMPANY,
By E. G. TIMME,
Vice President.

(Seal)

State of Illinois, }
County of Cook. } ss:

On this 1st day of July, 1935, before me personally came E. G. Timme to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice President of the National Casualty Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority.

D. C. DAVIS,
Notary Public.

(Notarial Seal)

My Commission Expires July 11, 1938.

441 Certificate.

I, R. D. Weilbrenner, Assistant Secretary of the National Casualty Company, do hereby certify that the attached Power of Attorney dated July 1st, 1935 in behalf of W. E. Krafft is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this 10th day of January, 1936.

R. D. WEILBRENNER (Signed)
Assistant Secretary.

(Seal)

442 And on, to wit, the 20th day of January, 1936, came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Praecipe for Record in words and figures following, to wit:

443 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Jan. 20,
* * (Caption—44241) * *

PRAECIPE FOR RECORD.

To the Clerk:
of the District Court of the United States in and for the Northern District of Illinois, Eastern Division:

The defendants, and each of them, hereby request you to prepare, certify and transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a transcript of the record in the above entitled cause and to include therein the following:

1. Placita.
2. First count of complaint filed February 11, 1935, together with condensed statement of remaining counts of complaint, to be used for purposes of transcript as per stipulation of the parties filed herein on January 18, 1936.
3. Stipulation of the parties filed January 18, 1936, respecting use of condensed statement of the remaining counts of the complaint.
4. Order of the court entered January 18, 1936 approving stipulation of the parties filed January 18, 1936 respecting condensed statement of the remaining counts of the complaint described in preceding paragraph #3.

444 5. Summons issued March 1, 1935, and return of the Marshal thereon.

6. Appearance and motion of the defendant, Continental Casualty Company filed March 20, 1935, to dismiss the complaint.
7. Appearance and motion of the defendant, Sam Howard, filed April 1, 1935, to dismiss complaint.
8. Order entered April 18, 1935, denying and overruling defendants' motion to dismiss the complaint, and allowing defendants' exceptions thereto, granting leave to plaintiffs to file amended complaint in ten days and directing defendants to answer in thirty days thereafter, and allowing defendants' exceptions thereto.
9. Amendment to complaint filed April 26, 1935.
10. Joint and several answer of the defendants filed May 27, 1935.
11. Order assigning cause to Judge Geiger for trial, August 6, 1935.

12. Answer of plaintiffs to affirmative defenses of the defendants filed September 7, 1935.

13. Order entered September 16, 1935, overruling and denying defendants' motion to dismiss complaint as amended and allowing defendants' exceptions thereto, and consolidating cause with causes 43996 and 44270; calling cause for trial; impanelling a jury, and after hearing part of evidence continuing cause to September 17, 1935, at 9-30 A. M.

14. Order September 17, 1935, overruling defendants' motion at close of plaintiffs' testimony to exclude all plaintiffs' evidence, and allowing defendants' exceptions thereto; and overruling defendants' motion at conclusion of plaintiffs' testimony to direct jury to return verdict in favor of defendants, and allowing defendants' exceptions thereto, and after hearing testimony continuing cause to September 18, 1935.

15. Order September 18, 1935, after further testimony for defendants continuing cause for trial to September 19, 1935, at 9-30 A. M.

16. Order September 19, 1935, overruling and denying defendants' motion to exclude all evidence submitted to jury and allowing defendants' exceptions thereto; and overruling and denying motion of defendants to direct jury to return verdict finding issues for the defendants, and allowing defendants' exceptions thereto; order overruling and denying requested instructions, and allowing defendants' exceptions thereto; and overruling objection to charge to jury and allowing exception to charge; verdict of the jury and allowing defendants' exceptions thereto; entry of motion for new trial by defendants, leave to file written motion, and cause continued for disposition.

445 17. Verdict of the jury, September 19, 1935.

18. Order September 24, 1935, extending time for defendants to file written motion for new trial to and including October 2, 1935.

19. Agreed order October 2, 1935, that motion for new trial filed in cause #43996 stand as motion for new trial in this cause.

20. Stipulation filed January 18, 1936, that the Clerk of the Court shall not set forth in the transcript of record to be prepared by him in extenso defendants' motion for new trial filed October 2, 1935, said motion being identical with the motion for new trial in cause number 43996 entitled—United States of America etc. plaintiffs *vs.* Sam Howard and Continental Casualty Company, a corporation, defendants,

number 43996, and shall insert in the transcript said stipulation instead of said motion.

21. Order of January 18, 1936, approving stipulation of the parties dated January 18, 1936, described in preceding paragraph #20.

22. Order October 18, 1935, overruling and denying defendants; motion for new trial, and allowing defendants' exceptions thereto; also order overruling and denying motion of defendants for judgment non obstante vere dicto and allowing defendants' exceptions thereto; order denying defendants' motion in arrest of judgment and allowing defendants' exceptions thereto; order entering judgment on verdict and allowing defendants' exceptions thereto; and granting defendants to December 1, 1935, to file bill of exceptions and term extended accordingly for said purpose.

23. Agreed order entered November 29, 1935, settling and approving bill of exceptions.

24. Bill of exceptions filed November 29, 1935, together with notice and stipulation as to settling and filing and approving.

25. Notice and acknowledgment of service of petition for appeal filed January 10, 1936, together with petition for appeal and assignments of error accompanying same, filed January 10, 1936.

26. Order entered January 10, 1936, allowing petition for appeal and fixing supersedeas and appeal bond and directing citation.

27. Appeal and supersedeas bond filed January 10, 1936.

28. Citation issued January 10, 1936, acceptance of service thereof.

29. Praecipe for record.

30. Clerk's certificate.

Dated at Chicago, Illinois, January 20, 1936.

JULIUS MOSES,
Attorney for Defendant Sam Howard.
LLOYD HETH,
WM. P. SMITH,
Attorneys for Defendant Continental Casualty Company.

The undersigned attorneys for the Plaintiffs join in the above praecipe of record.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE.

446 Northern District of Illinois }
Eastern Division } ss.

I, Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled United States of America on relation of Chester A. Willoughby as Trustee in Bankruptcy of National Mechanical Service Company, a corporation *vs.* Sam Howard and Continental Casualty Company, No. 44241, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 4th day of February, A. D. 1936.

HENRY W. FREEMAN,
Clerk.

(Seal)

447 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—44241) * *

CITATION.

United States of America }
Northern District of Illinois } ss.
Eastern Division }

To: Chester A. Willoughby, as Trustee in Bankruptcy of: National Mechanical Service Company, a corporation; A. H. Abbott & Co., a corporation; Acme Oil Corporation, a corporation; Advertising Displays, Inc., a corporation; Ajax Furniture Co., a corporation; John Schroeder and Edna J. Schroeder, individually, and as copartners, doing business as Albany Park Heating Co.; Albert Andersen and Lillian Andersen, individually, and as copartners, doing business as Albert Andersen; Anderson Jewelry Co., a corporation; Architectural Tile and Mosaic Company, Inc., a corporation; Ben Babel; Edward C. Becker; E. J. Biggs, doing business as Biggs Construction Company; Henry H.

Brown Cabinet Company, a corporation; Burr Vack Company, a corporation; S. S. Chevlen Co., Inc., a corporation; Chicago Brass Works, a corporation; Cicero Furniture House, Inc., a corporation; John W. Bentley Company, a corporation; Ely Blechman; Harry Blumenschein; Harry Chavis, trading as Belmont Shoe Store; Signe Chouinard; Diamond Iron and Metal Company, a corporation; W. I. Draper and Co., (William I. Draper, individually, and doing business as W. I. Draper and Co.); Eagle Metalware
448 Manufacturing Company, a corporation; Froehling and Heppe Co., a corporation; Abraham Furman, doing business as G. and F. Bootery; Gatziolis Bros., Inc., a corporation; Goldman Bond and Mortgage Co., a corporation; Hatch Sattley, Inc., a corporation; Bert Hamburger, individually, and doing business as Phyllis Shop; Sarah D. Hoffman, doing business as The Grove Style Shop; Hans N. Jepsen; Irving Kaplan, doing business as Kaplan's Millinery; Peter M. Cibulskis; The Club Managers Service Corp., a corporation; Coffee Dan's, Inc., a corporation; Cole and Dunas Music Co., a corporation; Cunningham System, Inc., a corporation; Alfonso Fiorentini, doing business as Italian Sausage Works; Samual Friedman, trading as The Gem Box and Kiddies Kloes Shop; James M. Goodell, Jr., Inc., a corporation; Harry Lapping and Max Janosky, individually, and as copartners doing business as George's Cloak and Suit Co.; Harrison's Orange Huts, Inc., a corporation; Janows and Kramer Co., a corporation; Leo Klier; Max J. Lang; Lanora Products Co., a corporation; M. W. Lorch, Inc., a corporation; Stanley Mruk; Gaston L. Alciatore, doing business as Louisiana Restaurant; Carterville and Herrin Coal Co., a corporation; Albert G. Hanisch and Elsie M. Yost, individually, and as copartners, doing business as Hanisch and Yost; Hafner Chevrolet Company, a corporation; Fladyslaw Lewandowski, also known as Walter Lewandowski; McCoy Schulten Company, a corporation; Marine Dredge and Gravel Company, a corporation; Walter M. Merker; Major Isaacson, doing business as Major Paint Store; A. B. C. Tire and Rubber Company, a corporation; A. F. Beard, doing business as Direct Sales and Service Co.; Sam Cherry; Cook, Thomas and Cash, Inc., a corporation; Earl DeYoung and Company, a corporation; Harry Graff, Inc., a corporation; Donald R. Kimbark, Inc., a corporation; Kolax Company, Inc., a corporation; Edward I. Leibow; National Theatres Corporation, a

corporation; Ida Nauman, doing business as Sydelle Dress Shop; North Shore Tile Company, a corporation; Ora Tone Company, a corporation; Bernard Osberg; Peerless Piston Ring Mfg. Co., Inc., a corporation, also trading under the name of Accurate Auto Parts Corp.; Mrs. Phillips Home Made Candies, Inc., a corporation; Phoenix Coal and Coke Co., a corporation; Piccadilly Pharmacy, Inc., a corporation; Phillip Price, doing business as The Leading Tail-
449 ors; Maurice A. Price and Louis A. Price, ind. and as co-partners d. b. as Price Brothers; Edward A. Ramsten; Reback, Inc., a corporation; Hyman Resnikoff and David Alberts, individually, and as co-partners doing business as Resnikoff and Alberts; W. H. Rogers Company, a corporation; L. Rosen, doing business as Roselawn Baby Store; H. R. Rosenbaum Co., a corporation; Simon J. Rosenthal, doing business as Sheridan Vogue Shop; Sall Mountain Company, a corporation; Schack Artificial Flower Company, a corporation; Walter E. Schmuckal; C. W. Schneider; C. A. Smid, individually, and doing business as C. A. Smid & Company; Southwest Lumber Company, a corporation; Spertus, Inc., a corporation; Harry Graivier, Morris Gertier and Fannie Goldstein, individually and as copartners doing business as Standard Parlor Furniture Company; Bertha E. Stevens; Lester H. Stone; Moses Stone Company, a corporation; Robert S. Strauss and Company, a corporation; Sucherman Pharmacy Inc., a corporation; May Swanson, trading as Dixie Donut Shop; Terrace Chocolate Shop, a corporation; R. R. Thompson, doing business as Louise Style Shop; Tilt Top Mfg. Co., a corporation; Tower Recreation of South Chicago, Inc., a corporation; United Department Stores, Inc., a corporation; Max N. Vogel; Webber and Wells, Inc., a corporation; Hugo Weiss, doing business as The United States Die Casting Co.; William H. Wienhoeber; Ben Weissman; Whiteside and Wentworth, Inc., a corporation; Samuel H. Wolk, doing business as Wolk's Style Shop; Midland Products Manufacturing Co., a corporation, and

George B. McKibbin, Walter E. Beebe and Hamilton K. Beebe, their attorneys of record:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, for the Seventh Circuit, to be holden in the City of Chicago, Illinois, in said Circuit, on the 9th day of Febru-

ary, A. D. 1936, pursuant to an order allowing an appeal and to an appeal and notice thereof, accompanied by an assignment of errors, filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, in law No. 44241, wherein Sam Howard and the Continental Casualty Company, a corporation, are defendants, and you are plaintiffs, and to show cause, if any
450 there be, why the decree rendered against said defendants, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ferdinand A. Geiger, Judge of the United States District Court for the Northern District of Illinois, sitting by designation, at Chicago, Illinois, within said district, this 10 day of January, 1936, and the 160th year of the Independence of the United States of America.

F. A. Geiger,
United States District Judge, sitting by designation.

The undersigned hereby accepts service and due notice of the above citation and waives any further or different service thereof.

Dated this 10 day of January, 1936.

Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al.,
By George B. McKibbin,
Walter E. Beebe,
Hamilton K. Beebe,
Attorneys.

451 Endorsed: U. S. District Court * * (Caption—44241) * * Citation Filed Jan 10 1936 Henry W. Freeman, Clerk. Julius Moses Lloyd Heth and William P. Smith, 231 S. LaSalle St. Chicago.

72 And on, to wit, the 2nd day of October, 1935, came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Motion for New Trial in words and figures following, to wit: Filed Oct. 2, 1935.

73 United States of America
Northern District of Illinois } ss:
Eastern Division

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

Eastern Division.

United States of America, ex rel Chester A. Willoughby, as trustee in Bankruptcy of Bennett's, Inc., a corporation, bankrupt
Plaintiff,
vs.
Sam Howard and Continental Casualty Company, a corporation
Defendant.
} No. 43996.

MOTION FOR NEW TRIAL.

Now come the defendants, Sam Howard and Continental Casualty Company, a corporation, and each of them, by their respective attorneys, and move the Court to set aside the verdict rendered by the jury herein and to grant the defendants a new trial of the case.

And in support of said motion and as grounds therefor, the defendants respectively show the Court the following:

(1) The verdict is contrary to the law.

(2) The verdict is not supported by sufficient evidence.

(3) The verdict is against the charge of the Court.

74 (4) The Court erred in refusing to entertain the motion of defendants at the close of plaintiff's case in chief that the jury be directed to return a verdict of not guilty for the defendants and each of them, the refusal of the Court to entertain such motion being based upon defendants' unwillingness to abide by the case as then made out.

(5) The Court erred in denying the motion of defendants at the close of plaintiffs case and or the entire case, that all and/or certain parts of the evidence be excluded from the jury and the jury be directed to return a verdict of not guilty for the defendants and each of them.

(6) The Court erred in admitting irrelevant, incompetent and prejudicial evidence offered by the plaintiff, and in rejecting evidence offered by the defendants.

(7) The Court erred in admitting evidence offered by the plaintiff in the form of statistical data tending to show the condition of the Phillips State Bank & Trust Company during the period in controversy, said condition being immaterial to the issues of the case and not shown to have come to the notice or knowledge of the defendant, Sam Howard.

(8) The Court erred in admitting evidence offered by the plaintiff of reports published in local Chicago newspapers during said period by said Bank pursuant to the Illinois General Banking Act, said reports not reflecting the stability of the Bank, nor being shown to have come to the notice or knowledge of the defendant, Sam Howard, and being immaterial to the issues of the case.

(9) The Court erred in admitting evidence offered by the plaintiff of the total amount of demand or commercial deposits of said Bank at the end of each month during said period, the amount of said deposits not reflecting the stability of the Bank, nor being shown to have come to the notice or knowledge of the defendant, Sam Howard, and being immaterial to the issues of the case.

(10) The Court erred in admitting evidence offered by plaintiff of the total amount of deposits of said Bank at the end of each month during said period, the amount of said deposits not reflecting the stability of the Bank, nor being shown to have come to the notice or knowledge of the defendant, Sam Howard, and being immaterial to the issues of the case.

(11) The Court erred in admitting upon offer of the plaintiff, multiple eye-witness accounts of "runs" on said Bank during said period, said evidence being immaterial to the issues of the case and having a highly prejudicial effect upon a jury.

(12) The Court erred in admitting evidence upon offer of the plaintiff multiple accounts by witnesses of fears and suspicions entertained by them concerning the stability of said Bank, and of consequent withdrawals during said period

by them of all moneys deposited with said Bank, said evidence being immaterial to the issues of the case and having a highly prejudicial effect upon a jury.

(13) The Court erred in admitting evidence offered by the plaintiff of rumors circulating in the neighborhood of said Bank during said period concerning the insolvency of said Bank, said evidence being immaterial to the issues of the case and highly prejudicial in effect upon a jury.

(14) The Court erred in admitting evidence offered by the plaintiff of the closing of banks during said period in Cook County, Illinois, other than said Phillip State Bank & Trust Company, said evidence being immaterial to the issues of the case.

76 (15) The Court erred in admitting evidence offered by the plaintiff of accounts appearing in Chicago newspapers in June 1931, reporting the consolidations of certain Chicago banks, viz., the Foreman State Bank & Trust Company with the First National Bank of Chicago and the National Bank of the Republic with the Central Trust Company, said evidence being immaterial to the issues of the case.

(16) The Court erred in admitting evidence offered by the plaintiff of the existence during said period in Cook county, Illinois, of several designated depositories of the court other than said Phillip State Bank & Trust Company, and of the amounts of their respective depository bonds, said evidence being immaterial to the issues of the case, raising an issue as to a supposed duty of the defendant, Sam Howard, during said period, to exercise discretion in choosing among the several depositories one in which to deposit bankruptcy funds administered by him which issue is at variance with that pleaded by the plaintiff, and failing in the issue so raised in that nothing is therein shown, nor was proof offered, indicating the relative financial conditions of said several depositories during said period.

(17) The Court erred in refusing to admit evidence offered by the defendants of certain amounts of bankruptcy estate funds deposited during said period by trustees and receivers in bankruptcy of the Court in designated depositories located in Cook County, Illinois, other than said Phillip State Bank & Trust Company, said deposits exceeding at various times the amount of the respective depository bonds given by the depositories in which the deposits were made.

77 (18) The Court erred in admitting evidence offered by the plaintiff of a commercial banking account known

as the "Sam Howard Account" and of a similar account known as the "Sam Howard Special Account" kept by the defendant, Sam Howard, with said Phillip State Bank & Trust Company during said period, said evidence being immaterial to the issues of the case.

(19) The Court erred in admitting evidence of unsecured personal loans made during said period by said Bank to the defendant, Sam Howard, said evidence being immaterial to the issues of the case and highly prejudicial in effect upon a jury.

(20) The Court erred in refusing to admit evidence offered by the defendants establishing that said loans were obtained by the defendant, Sam Howard, from said Bank for the purpose of making cash advances to various bankruptcy estates administered by him and needed to meet the expenses of said estates.

(21) The Court erred in refusing to admit evidence offered by the defendants that the moneys deposited by the defendant, Sam Howard, in said personal banking accounts with said Bank were used for such purpose.

(22) The Court erred in refusing to admit evidence offered by the defendants of the amount of cash advances to-wit, Twelve Thousand Nine Hundred and Ninety-one Dollars ($12,991.00) made out of said deposit accounts for such purpose during said period by the defendant, Sam Howard, to certain bankruptcy estates administered by him, the funds of which were kept on deposit at said Bank.

(23) The Court erred in refusing to admit evidence offered by the defendants of the amount of cash advances,
78 to-wit, Two Thousand Seven Hundred Twenty-eight Dollars and forty cents ($2,728.40), made out of said deposit accounts for such purpose during said period by the defendant, Sam Howard, to certain bankruptcy estates administered by him other than those in controversy.

(24) The Court erred in refusing to admit evidence offered by the defendants of the amount of money still owing to the defendant, Sam Howard, from such bankruptcy estates on account of such advances.

(25) The Court erred in refusing to admit evidence offered by the defendants that cash advances of such character made by the defendant, Sam Howard, to bankruptcy estates administered by him are repaid to him in the usual course of administration out of the funds of said estates after approval by the bankruptcy court of the final account and re-

port made by the trustee or receiver in said estates, and that a period from eight months to two years generally elapses between the time said cash advances are made and the moneys repaid.

(26) The Court erred in refusing to admit evidence offered by the defendants of a general well-known and uniform custom and practice prevailing for several years in the District Court, Northern District of Illinois, for trustees and receivers in bankruptcy appointed by said Court, with the knowledge and approval of said Court and its Referees, to advance moneys out of their own individual funds to bankruptcy estates administered by them for the purpose of defraying estate expenses.

(27) The Court erred in refusing to admit evidence offered by the defendants of a certain form used throughout the period in controversy by the defendant, Sam Howard, in making final accounts and reports to the court as receiver or trustee in bankruptcy, said form containing an item 79 for advances made by said defendant as such receiver or trustee to the bankruptcy estate in question being administered.

(28) The Court erred in refusing to admit evidence offered by the defendants that prior to 1930 the defendant, Sam Howard, kept funds of bankruptcy estates administered by him as receiver or trustee on deposit in certain Chicago bank known as the Central Trust Company and that said Bank at said time made unsecured personal loans of money to said defendant required by him in making cash advances to said bankruptcy estates for defraying estate expenses.

(29) The Court erred in refusing to admit evidence offered by the defendants that prior to 1930 and during the period in controversy the defendant, Sam Howard, kept funds of bankruptcy estates administered by him as receiver or trustee on deposit in a certain Chicago bank known as the Foreman State Bank & Trust Company of Chicago, and that said Bank made unsecured personal loans of money to said defendant, required by him in making cash advances to said bankruptcy estates for defraying estate expenses.

(30) The Court erred in making the following remarks of highly prejudicial character in the presence of the jury concerning the practice of banks having receivership or trust estate funds on deposit with them, to make personal unsecured loans to the receiver or trustee administering such

funds for the purpose of meeting the expenses of estates whose funds were so deposited:

"Well, it is just an intolerable sort of thing. Nobody could give any sanction to that sort of thing," and,

"I indicated yesterday, and I will say it again, that personal loans made by Mr. Howard from the Bank and testified to yesterday, simply could not be made for the considerations that were then given".

80 (31) The Court erred in admitting evidence offered by the plaintiff of certain indirect or secondary liability of the defendant, Sam Howard, to said Phillip State Bank & Trust Company, accruing during said period, said evidence being immaterial to the issues of the case.

(32) The Court erred in admitting evidence offered by the plaintiff of overdrafts in the several deposit accounts of bankruptcy estate funds kept by the defendant, Sam Howard, with said bank during said period, said evidence being immaterial to the issues of the case and prejudicial in effect upon a jury.

(33) The Court erred in refusing to admit evidence offered by the defendants of a certain agreement had by the Phillip State Bank & Trust Company with a certain bank known as the Central Trust Company of Chicago, to advance to the Phillip State Bank & Trust Company, upon the security of its assets any and all money needed by it to meet the "run" of June 1932, upon said Bank, and of the repudiation of said agreement by the officers of said Central Trust Company of Chicago, said repudiation being the cause for the failure and closing of said Phillip State Bank & Trust Company.

(34) The Court erred in refusing to admit evidence offered by the defendants of a conversation occurring in late May or early June 1931, between the witness, Joseph A. Muir, then Chief Deputy Clerk of the District Court, Northern District of Illinois, and the Honorable George Carpenter, then Senior Judge of said District Court, dealing with the amounts of depository bonds then given by the designated depositories of said Court, the amount of bankruptcy estate funds then kept in said depositories by receivers and trustees in bankruptcy of said Court including the amount of such funds then kept in said Phillip State Bank & Trust Company, and the then prevailing banking situation in said District.

81 (35) The Court erred in refusing to admit evidence offered by the defendants that in early June 1931, said

Honorable George Carpenter, as Judge of said Court, requested said Muir, as Clerk of said Court, to communicate with the then various receivers and trustees in bankruptcy appointed by the District Court and request them to file a statement or report of the total amount of bankruptcy estate funds kept by said receivers and trustees on deposit in various designated depositories, that thereafter said Clerk telephoned the defendant, Sam Howard, and informed him of said Court's request, that on June 9, 1931, said Sam Howard filed a statement or report with said Clerk which thereafter was given to said Judge Carpenter and retained by him.

(36) The Court erred in refusing to admit evidence upon offer of the defendants of said statement or report, said statement or report being in the form of a letter dated June 9, 1931, signed by the defendant, Sam Howard, and reporting to the District Court, among other things, the amount of bankruptcy estate funds then kept by said defendant on deposit with said Phillip State Bank & Trust Company.

(37) The Court erred in refusing to admit evidence offered by the defendants of a conversation or conversations occurring subsequent to June 11, 1931, between Charles M. Bates Clerk of the District Court, Northern District of Illinois, and said Judge Carpenter, dealing with the keeping of reports filed with said Clerk by receivers and trustees in bankruptcy pursuant to the order entered by said Judge on June 11, 1931, in evidence.

82 (38) The Court erred in refusing to admit evidence offered by the defendants of a conversation in the middle of 1931 between said Judge Carpenter and said Bates as Clerk of said Court wherein said Clerk was instructed to bring to said Judge and deposit with him all reports filed by receivers or trustees pursuant to said order of June 11, 1931, in the office of said Clerk.

(39) The Court erred in refusing to admit evidence offered by the defendants of a certain compilation in writing made in the summer of 1931 by the Secretary of Judge Carpenter, at the request of said Judge and given to him, said compilation being a compilation of reports theretofore made to said Judge by the various receivers and trustees in bankruptcy appointed by the District Court and showing the amounts of bankruptcy estate funds then deposited by said receivers and trustees in various depositories designated by the Court including said Phillip State Bank & Trust Company.

(40) The Court erred in refusing to admit evidence offered by the defendants of the form used by the defendant, Sam Howard, as trustee or receiver in bankruptcy in making reports to the District Court pursuant to the order of said Court entered on June 11, 1931.

(41) The Court erred in charging the jury contrary to the law and facts of the case.

(42) The Court erred in failing to charge the jury as suggested by the defendants.

83 (43) The Court erred in charging the jury in substance that the jury could not, in arriving at its verdict, consider matters of common knowledge not in evidence in the case; said charge being made in effect in the following portion of the general charge to the jury:

"There were references in the testimony to what were characterized as matters of common knowledge, asserted occurrences outside of any proof here, assumed at the time, or since then, to have come to your knowledge as men of affairs in this community; and it was suggested, necessarily by implication, that you take those matters into consideration in determining this case. That, you are not privileged to do, gentlemen. You are required to consider the evidence here as the single and the sole body of matters of fact testified to or brought into the case for the purpose of determining the question which is for you to determine."

Said charge was likewise in effect made in the following remarks and ruling of the Court, stated by the Court in the presence of the jury:

"Well, I don't believe this jury is privileged to discharge its duty in that way, Mr. Moses. * * * The jury can't upon an appeal from counsel, go outside of the evidence and decide among themselves what recollection they have of other matters occurring three years ago, and allow them to proceed to discharge their duty in this case in that manner. It can't be done, Mr. Moses."

(44) The Court erred in charging the jury in effect that a trustee or receiver in bankruptcy having bankruptcy estate funds on deposit in a designated depository holds such funds while so on deposit in a fiduciary capacity; said charge being implicit in the following portions of the general charge to the jury:

84 "I do not know whether it is necessary at this time to give you an admonition that I gave to counsel during the discussion; and it is this: That in the consideration of

these cases, you are to be concerned solely with the consideration of the evidence, determining what credit you will give to it, and where, upon fair and dispassionate consideration, it leads you, with respect to the determination of the one matter that is here in issue; namely, the conduct of the defendant Howard in the performance of his duty as either Trustee or Receiver, in the light of the obligation which the law placed upon him as a Trustee, or, as it is at times called, a fiduciary. * * * At the outset, gentlemen, you are considering here the obligation which the law places upon a Trustee, or, as I said a moment ago, a fiduciary, with respect to the care that he is to bestow upon the conservation and the disposition of property of others entrusted to him for purposes of administration."

(45) The Court erred in charging the jury in effect that the defendant, Sam Howard, had the duty of exercising the highest good faith and disinterestedness in conserving the bankruptcy estate funds in controversy while said funds were on deposit in a designated depository, to-wit, the Phillip State Bank & Trust Company; said charge being contained in effect in the following portion of the general charge to the jury:

"At the outset, gentlemen, you are considering here the obligations which the law places upon a Trustee or, as I said a moment ago, a fiduciary, with respect to the care that he is to bestow upon the conservation and the disposition of property of others entrusted to him for purposes of administration. Under the law, that is a high duty, calling for the exertion by him of the highest good faith, and, so far as he is concerned personally, disinterestedness with respect to every other desire that he may have except the desire to discharge the trust."

(46) The Court erred in charging the jury in substance that a trustee or receiver in bankruptcy making or keeping deposits of estate funds in a designated depository cannot rely upon the designation of said depository under law or upon the supervision of the Court over said depository under law in the event prudence and care on the part of said receiver or trustee challenge the continued use of said
85 depository for such purpose; said charge being made in effect in the following portion of the general charge to the jury:

"The law, however, does not and is not to be taken by any one as a guaranty by the Court of the solvency of the

depositary for an unlimited period of time; nor as a warrant to a trustee or a receiver to relax or to ignore a duty otherwise resting upon him to act in case of actual danger with respect to the designated depositary.

In other words, although the Court under this law designates these depositaries, the Trustee or the Receiver is none the less obliged to take note of anything that may affect the prudence and the care of continuing on his part to recognize such a depositary; and in no event is he privileged, in the face of facts which challenge the propriety of continuing, the safety of continuing to use that depositary—in no event is he allowed to ignore such a situation, and merely continue to deposit on the assumption that the Court will find out in its own way, from time to time, whether or not such a depositary should be used, whether the Trustee or Receiver in fact thinks it should be or not."

(47) The Court erred in charging the jury in substance that a trustee or receiver in bankruptcy, making or keeping deposits of estate funds in a designated depository is required under law as a matter of prudence to observe whether the amount of such deposits greatly exceed the amount of depository bond given by said depository, and if such deposits do exceed said bond, whether it is proper to continue making or keeping such deposits in said depository; said charge being made in effect in the following portion of the general charge to the jury:

"I would say to you that the mere deposit of a sum in excess of that is not, standing alone, necessarily negligence. But, when a Trustee or receiver knows that, so far as the particular depository is concerned, it has given a bond which affords protection or security for a specified amount; then a trustee or a receiver should, in prudence, take note of the fact whether the deposits which he is making greatly exceed the amount of the surety bond thus given."

86 (48) Although it be assumed that a trustee or receiver in bankruptcy making or keeping estate funds on deposit in a designated depository is under duty to exercise reasonable prudence for the safety of the funds on deposit, the Court erred in charging the jury that in the exercise of such prudence such a trustee or receiver is bound by "notice" and not merely knowledge of facts; said charge being made in the following portion of the general charge to the jury:

"And therefore the duty of the Trustee in that connection

may arise, and in my opinion it does arise in this case, the question as to the duty, in connection with the other evidence in the case respecting the history of the bank, respecting its progress throughout the year and a half that is here under review; to the end that we may ascertain whether in that history there arose facts which, coming to the knowledge or notice of the trustee or receiver, challenged the propriety of his continuing to deposit and to leave there amounts greatly in excess of the security bond given by the depositary."

(49) The Court erred in charging the jury in effect that the defendant, Sam Howard, under the circumstances of the case was under duty to exercise a high degree of prudence and care in making or keeping deposits of bankruptcy funds at the Phillip State Bank & Trust Company in excess of the depository bond of said depository, and that in the discharge of that duty he was to exercise the care of a reasonable, prudent man; said charge being made in the following portions of the general charge to the jury:

"And you have a right to take this evidence, and ought to take it, to consider whether, under the circumstances of this case, the deposit of these various amounts, the continued maintenance of deposits greatly in excess of the amount of the security bond given by the depositary, constituted a want of reasonable care, a want of prudence by the defendant Howard, who was required to exercise a high degree of prudence and care in order to safeguard the funds entrusted to him in either capacity, as Receiver or Trustee."

87 "And I want to say to you that you are called upon here to apply the rule that would guide a reasonably prudent man; and that it is not a question of your individual willingness, if you saw fit to try to put yourself in his place, to answer by trying to determine speculatively what chances you might be willing to take. For a trustee cannot take chances which he may figure, if it were his personal matter, he might be willing to do. He is under the obligation which I have referred to."

(50) The Court gravely erred in its charge to the jury in singling out as a fact for comment and laying emphasis upon the arrangement between the defendant, Sam Howard, and the Phillip State Bank & Trust Company for the making by said Bank to said defendant of the personal loans in evidence.

(51) The Court erred in charging the jury that the loans

made by the Phillip State Bank & Trust Company to the defendant, Sam Howard, were in violation of law and improper; said charge being made in the following portion of the general charge to the jury:

"I say to you, gentlemen, that that sort of an arrangement, whereby the person of the Trustee is allowed to come into transactions personal to himself—and that is what these loans were, no matter how he wanted to use the money—that that sort of a bargain, if I can so call it, that sort of an admixture of his personal desires with his trust obligations, is utterly repugnant to what the situation permitted; not only under the law, but upon any sort of a test of propriety permitted either to the bank or to the Trustee."

(52) The Court erred in charging the jury that the purpose for which said loans were made was immaterial; said charging being made in the following portion of the general charge to the jury:

"I say to you, gentlemen, that that sort of an arrangement, whereby the person of the Trustee is allowed to come into transactions personal to himself—and that is what
88 these loans were, no matter how he wanted to use the money—that that sort of a bargain, if I can so call it, that sort of an admixture of his personal desires with his trust obligations, is utterly repugnant to what the situation permitted;"

(53) The Court erred in its charge to the jury in stressing as an important fact for the jury to regard, when considering the effect of said loans upon the performance by the defendant, Sam Howard, of the supposed fiduciary duty resting upon him under the facts of the case (the Court being in error in assuming and charging such duty existed), the fact that said loans were personal obligations of said defendant; said stress being laid in the following portion of the general charge to the jury:

"He could not with singleness of devotion regard the trust funds as being subject to his conservation upon appeal to what was prudent, for the reason that he was obligated to the bank in a personal way; which obligation concurred with, and, as I said a moment ago, was admixed with the trust obligation, so that the discharge of the trust obligation brought before him the necessity of his discharging his personal obligations."

(54) The Court erred in charging the jury that the defendant, Sam Howard, found himself in situations from time

to time requiring his decision whether he should leave the bankruptcy funds in controversy on deposit with the Phillip State Bank & Trust Company and whether he should continue as a depositor of said Bank, and further in charging that the decision or decisions made by said defendant was effected adversely by said arrangement for and existence of said loans; said charge being made in the following portion of the general charge to the jury:

89 "And therefore, this fact being determined, as I think it should be determined, of the character in law that I have just characterized it, bears importance upon the situation in which the defendant Howard was left, and in which he found himself from time to time, in interpreting things that occurred, the mere occurrence of which bore pertinently and necessarily upon the fact as to the condition of that bank, and his own view of it, and the course that he should pursue in respect of further continuing as a depositor, either as trustee or receiver.

In other words, these matters—and it is for you to remember the testimony, but as my recollection serves me, they came to Mr. Howard's attention for the first time in a rather decided manner as early as April, 1931, through a run which was found to have developed on the bank. You will remember the testimony regarding the seriousness of it. That was followed by a run in June, in September, and at or about the holidays of that same year; with a subsequent run the following year, resulting in the closing of the bank.

Now, gentlemen, take this proof and consider it in the manner in which I have indicated, by asking yourselves the question:

How should these proofs have impressed a reasonably prudent man, having no desire other than to safeguard and to conserve, with a singleness of devotion to the trust obligation, how should they have impressed Mr. Howard during this period of time, with respect to the course that he should pursue?"

(55) The Court erred in charging the jury in effect that in determining whether the defendant, Sam Howard, had lawfully discharged the supposed duty resting upon him under the evidence to regard the condition of the Phillip State Bank & Trust Company during the period in controversy (the Court being in error in assuming and charging the existence of such a duty), the jury could not consider as affecting the condition of said Bank said defendant was

to regard, the representations of the officers of both the Phillip State Bank & Trust Company and the Central Trust Company of Chicago that the Central Trust Company of Chicago would lend money to and otherwise support the Phillip State Bank and Trust Company in meeting "runs" on said Bank, nor could the jury consider in that respect
90 the conduct of such officers and the occurrences in evidence occurring in connection therewith, that is, if a reasonable prudent man under such circumstances could have relied upon such representations, and occurrences in discharging the supposed duty; said charge and failure to charge occurring in connection with the following portion of the general charge to the jury:

"If, on the other hand, you are satisfied that this bank throughout the period that is here under view had become a hazardous place to have trust funds, and taking into consideration what the defendant Howard knew about that,—and you have a right to go through the whole body of the evidence and determine what facts he knew respecting the condition of that bank; such facts as he would learn from an examination of the reports; such facts as he could infer from the circumstances that the officers of the bank themselves had concern respecting its ability to discharge its obligations to creditors; and in that connection I want to say to you that those facts must be the facts that deal with the condition of the bank; and if, as is true, it was stated by men connected with other banks that they might or would stand back of it, that those things were communicated to Howard with the idea of indicating a hopefulness on the part of those who communicated those facts to him; those facts, none the less, did not change the condition of the bank, nor alter the duty which the law imposed upon the defendant Howard in respect of those funds.'

(56) The Court erred in charging the jury in substance that the jury could find for the defendants only if the jury felt from all the evidence in the case that the following facts or conditions co-existed and were true (a) that the Phillip State Bank & Trust Company was in a safe condition; (b) that there was nothing which indicated the Bank as involving great hazards to trust funds, and (c) that the defendant, Sam Howard, knew of nothing that would challenge his right to continue to deposit and increase his deposit in said Bank; said charge being made in the following portion of the general charge to the jury:

91 "Now, if, upon a careful survey of all of this evidence, you feel that this bank was in a safe condition, and that there was nothing there that indicated the necessity of regarding it as involving hazards, great hazards to the trust funds, and that the defendant Howard knew of nothing that would challenge his right to continue not only to deposit, but to increase the deposits in the light of all the evidence here, as developed, your verdict in this case should be for the defendants."

(57) The Court erred in failing to charge the jury except by vagueness and inference the specific facts or fact which the jury must find in order to render a verdict for the plaintiff, and further in charging by implication that unless the jury found the facts specified in the charge as a condition to rendering a verdict for the defendants the jury was to find for the plaintiff.

(58) The Court erred in failing to charge the jury that unless the jury found from a preponderance of the evidence that the issues in the case were with the plaintiffs, the jury was to find for the defendants.

(59) The Court erred in charging the jury that the plaintiff had no large personal interest in the case.

(60) The Court erred, in its charge to the jury, in commenting upon and summing up the evidence in a one-sided manner prejudicial to the defendants and further in so commenting and summing up without clearly leaving it to the jury to understand that the jury was not bound as a matter of law to follow said comments and summing up, but were to decide for itself the facts in issue.

(61) The Court erred, in its charge to the jury, in that the effect and substance of the general charge was tantamount to a peremptory instruction and direction to the
92 jury to find the issues with the plaintiff and return a verdict in the plaintiff's favor.

(62) The Court erred in charging and failing to charge the jury as stated in the exceptions of the defendants to the charge of the Court.

(63) The Court erred in its charge to the jury in failing to charge the jury as requested by the defendants in certain written requests for instructions and in each of said requests, a copy of said written requests being attached hereto and incorporated herein.

(64) The Court erred in failing and refusing to submit

to the jury forms of verdict on each separate count in the amended complaint.

(65) The Court erred in submitting to the jury forms of verdict containing the amounts for which the jury should return such verdict, if the jury found the issues for the plaintiff.

MOSES, KENNEDY, STEIN & BACHRACH,
HETH & LISTER,
WM. P. SMITH,
Attorneys for Sam Howard and Continental Casualty Company, a corporation.

93 The defendants request the court to charge the jury that during the period in controversy in this case an Illinois Statute was in full force and effect, providing as follows:

"The Auditor as often as he shall deem necessary or proper, and at least once in each year, shall appoint a suitable person or persons to make an examination of the affairs of every bank established under the provisions of this Act, which person shall not be a stockholder or officer or employee of any bank which he may be directed to examine, and who shall have power to make a thorough examination into all the affairs of the bank, and in so doing to examine any of the officers or agents or employees thereof on oath, and shall make a full and detailed report of the condition of the bank to the Auditor."

* * *

"if it appears from the reports made to the Auditor that the conditions of any bank organized under this Act are such that the impairment of the capital stock cannot be made good or if in the opinion of the Auditor, it is operating with an insufficient portion of its assets in cash or readily convertible securities, or that the business of any such bank is being conducted in an illegal, fraudulent or unsafe manner, he may, in his discretion, without having taken the steps provided in this section to make good the impaired capital stock, forthwith, for the purpose of reorganization or liquidation through receivership, take possession and control of the banking house, furniture and fixtures, books, records and assets of every description, of such bank. If the Auditor determines that the bank cannot be reorganized and that the same should be liquidated through receivership he shall appoint a receiver, and require of him such bond and se-

curity as he deems proper. Such receiver, under the direction of the Auditor, shall take possession of, and for the purpose of the receivership, the title to, the books, records and assets of every description of such bank."

That the defendant, Sam Howard, at all times when he kept funds on deposit in the Phillip State Bank & Trust Company, had a right to assume that the auditor of the State of Illinois was causing examinations to be made of the affairs of said bank, and that if as a result of any of such examinations made by or on behalf of the said auditor it

94 appeared from the reports made to him that said bank was operating with an insufficient portion of its assets in cash or readily convertible securities, or that the business of the bank was being conducted in an unsafe manner, he might, in his discretion, forthwith appoint a receiver to take possession and control of the banking house, furniture and fixtures, books, records and assets of every description, of said bank.

95 The defendants request the court to charge the jury that the United States District Court had the right and power in its order designating the Phillip State Bank & Trust Company as depository of bankruptcy funds, to limit the amount of the deposits which might be received by it from bankruptcy trustees and receivers, to the amount of the penalty of the depository bond required by the order of the court to be given by said depository as a condition to its becoming a depository of bankruptcy bonds; and that in arriving at their verdict in this case the jury have the right to consider the fact that the said District Court did not exercise its power to limit the amount of the deposits which might be received by Phillip State Bank & Trust Company from bankruptcy trustees and receivers, to the amount of the penalty of said bond.

96 Defendants request the court to charge the jury that if the jury believe from the evidence that Judge Carpenter was informed as to the amount of funds the defendant, Sam Howard, had on deposit in the Phillip State Bank & Trust Company and was informed as to the amount of the depository bond, and if you further believe that having such information Judge Carpenter at no time thereafter revoked the order designating said Bank as a depository of bankruptcy funds, and at no time raised the amount of its depository bond, then said defendant, Sam Howard, had the

right to assume and believe that in the opinion of the United States District Court the Phillip State Bank & Trust Company as a designated bankruptcy depository was a safe place in which said defendant, Sam Howard, could continue to deposit funds held by him as receiver or trustee in bankruptcy.

97 The defendants request the court to charge the jury that the time when the defendant Sam Howard kept on deposit with Phillip State Bank & Trust Company the funds involved in this suit, there was in full force and effect an Act of Congress as follows:

"Depositories for Money.

(a) Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

That pursuant to the foregoing Act of Congress, the United States District Court, for the Northern District of Illinois, designated by order Phillip State Bank and Trust Company as depository for the money of the bankrupt estates, of which defendant, Sam Howard, was trustee, and said District Court required a bond to the United States to be given by said Phillip State Bank & Trust Company; that by virtue of said Act of Congress, the said District Court was given the power and right from time to time, as occasion might require, to increase the amount of the bond given by said Phillip State Bank & Trust Company, or to substitute by order in place of said Phillip State Bank & Trust Company some other banking institution, as depository for the money of the bankrupt estates, of which the defendant, Sam Howard, was trustee; that in arriving at their verdict the jury have a right to take into consideration the fact that the said District Court did not increase the amount of the bond given by said Phillip State Bank & Trust Company, as depository, and the fact that said District Court did not substitute by order in place of said Phillip State Bank & Trust Company, some other banking institution as depository, for the funds of the bankrupt estates, of which the defendant, Sam Howard, was trustee.

98 The defendants request the court to charge the jury that there was no duty upon the said defendant, Sam

Howard, to report to the United States District Court any fact which was a matter of common knowledge in the community and if you believe from the evidence that it was a matter of common knowledge in the community that receivers had been appointed by the state courts for the certain banks shown by the evidence to have been placed in the hands of receivers by the state courts, then it was not necessary for said defendant, Sam Howard, to report the fact of such receiverships to the District Court.

99 The defendants request the court to charge the jury that there was no duty imposed by law upon the defendant, Sam Howard, to limit the amount of deposits of bankruptcy funds made by him in the Phillip State Bank & Trust Company to the amount of $50,000, the amount of the depository bond.

100 The defendants request the court to charge the jury that no duty was imposed by the law upon the defendant, Sam Howard, to ascertain the amount of bankruptcy funds deposited by other receivers or trustees in bankruptcy in the Phillip State Bank & Trust Company, or in any other bankruptcy depository, for the purpose of ascertaining whether the total aggregate amount of the funds deposited by such trustees or receivers in bankruptcy in any given depository exceeded the penalty of the bond required of such depository by the District Court as a condition of becoming a depository of bankruptcy funds of the court.

101 The defendants request the court to charge the jury that there is no evidence in the record in this case proving, or tending to prove, that the said defendant, Sam Howard, failed to well, faithfully and truly account for all the moneys of the estates referred to in this cause which had come into his possession as receiver or trustees in bankruptcy.

102 The defendants request the court to charge the jury that the defendant, Sam Howard, was not an insurer of the bankruptcy funds which came into his possession as receiver or trustee in bankruptcy.

103 The defendants request the court to charge the jury that the United States District Court had the right and power in its order designating the Phillip State Bank & Trust Company as depository of bankruptcy funds, to limit the amount of the deposits which might be received by it from bankruptcy trustees and receivers, to the amount of the penalty of the depository bond required by the order of the court

to be given by said depository as a condition to its becoming a depository of bankruptcy funds.

104 The defendants request the court to charge the jury that it was the duty of the United States District Court to investigate and ascertain the financial condition of such bank as made application to the Court to become a designated depository of bankruptcy funds, and accordingly it was the duty of the District Court to investigate and ascertain the condition of the Phillip State Bank & Trust Company when said bank made application to the court to become a designated depository of bankruptcy funds, and that it was likewise the duty of the court to fix and determine the amount of the depository bond to be filed by said depository and that said District Court had, by virtue of the law the power and was its duty to revoke said designation if it determined that said bank was unsafe or to raise the amount of the penalty of the bond that it demanded, as in its opinion occasion might require.

105 The defendants request the court to charge the jury that the law did not impose upon the defendant, Sam Howard, the duty to investigate and ascertain the financial condition of the Phillip State Bank & Trust Company which had been designated by the court as a depository of bankruptcy funds and to report its financial condition to the court.

106 The defendants request the court to charge the jury that at the times when the defendant, Sam Howard, kept on deposit with Phillip State Bank & Trust Company the funds involved in this suit, there was in full force and effect a rule of the United States District Court for the Northern District of Illinois, Eastern Division, as follows:

"Payment of moneys deposited.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and counter-signed by the judge of the court or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all check and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of

each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said check."

That by virtue of the foregoing rule of said court, all moneys deposited by said defendant, Sam Howard, in said Phillip State Bank & Trust Company, as trustee in bankruptcy for the various estates involved in this suit, were subject to withdrawal from that bank as depository, only in the event that the checks or warrants for such withdrawal were countersigned by the judge of the court or by a referee in bankruptcy of said court, or by the clerk or his assistant under an order made by the judge stating the date, the sum and the account for which it is drawn; that in arriving at their verdict in this case the jury have a right to take into consideration the fact that by virtue of such rule all checks or warrants signed by said defendant, Sam Howard, as trustee in bankruptcy of the various estates involved in this suit, were required to be countersigned by the judge of the court, or by a referee in bankruptcy, or by the clerk or his assistant, under an order made by the judge, stating the date, the sum, and the account for which it was drawn.

107 The defendants request the court to charge the jury that at the times when the defendant, Sam Howard, kept on deposit with Phillip State Bank & Trust Company the funds involved in this suit, there was in full force and effect an Act of Congress as follows:

"Duties of Trustees.

(a) Trustees shall respectively (1) account for any pay over to the estates under their control all interest received by them upon property of such estates;

* * * * *

(3) Deposit all money received by them in one of the designated depositories;

* * * * *

(4) Disburse money only by check or draft on the depositories in which it has been deposited;

* * * * *

(8) Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meeting of the creditors;

* * * * *

(10) Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other

details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts."

108 The defendants request the court to charge the jury that even though the jury believe from the evidence in this case that the defendant, Sam Howard, at some time prior to the closing of the Phillip State Bank & Trust Company acquired knowledge or was put on notice that said bank was insolvent or in a precarious financial condition, nevertheless the jury have no right by their verdict to hold the defendants, or either of them, responsible for loss of the funds belonging to any particular receivership or bankrupt estate, unless they believe from the evidence in this case that the funds of such particular receivership or bankrupt estate were deposited by the defendant, Sam Howard, in the Phillip State Bank & Trust Company, or kept on deposit in said bank subsequent to the time when the said defendant, Sam Howard, acquired knowledge or was put on notice (if you believe from the evidence that he did acquire such knowledge or was put on such notice) that said bank was insolvent or in a precarious condition; that if the jury is unable to determine from the evidence in this case that the funds of any particular bankruptcy or receivership estate were deposited or kept on deposit after the time when the said defendant, Sam Howard, acquired knowledge or was put on notice (if you believe from the evidence that he did acquire such knowledge or was put on such notice), then the jury has no right to include in its verdict any amount corresponding to the funds of such particular receivership or bankrupt estate.

IN THE

Filed Feb. 19, 1936

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit,

October Term A. D. 1935.

Sam Howard and Continental Casualty Company, a corporation,
Appellants,
No. 5756 *vs.*
United States of America on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, *et al.,*
Appellee.

Sam Howard and Continental Casualty Company, a corporation,
Appellants,
No. 5757 *vs.*
United States of America on relation of Chester A. Willoughby, as Trustee in Bankruptcy of Bennett's Inc., a corporation, bankrupt,
Appellee.

Sam Howard and Continental Casualty Company, a corporation,
Appellants,
No. 5758 *vs.*
United States of America, on relation of Chester A. Willoughby, as Trustee in Bankruptcy of Eli Lande and Morris Lande individually and as co-partners, trading as Lande Brothers, *et al.,*
Appellee.

STIPULATION.

Whereas, the above causes lately pending in the District Court of the United States for the Northern District of Illinois, were by agreement of the parties consolidated for trial in said court and heard and submitted together in said court upon the same evidence, and

Whereas, said causes so heard and submitted are now pend-

ing in this Court upon appeal and are described in this court under the above titles,

Now, Therefore, It Is Stipulated and Agreed by and between the parties hereto and their respective attorneys as follows:

First: That said causes above described be consolidated for hearing and heard before this Court at one and the same time.

Second: That the Clerk of this Court shall cause to be printed the transcript of record filed in the cause in this Court described as cause #5756 only, and shall not cause to be printed transcripts of record filed herein in the causes described in this court as #5757 and #5758, except the motion for new trial filed October 2, 1935, shown as #18 of the praecipe for record filed in cause #5757, which said motion for new trial the Clerk shall cause to be printed and bound with the transcript of record in said cause #5756.

Third: That the hearing in said consolidated causes before this Court shall be had upon the said printed transcript of record in cause #5756 with said motion for new trial in said cause #5757 included therein.

Fourth: That the final decision and judgment of this court in cause #5756 shall be binding and conclusive upon the parties hereto in the said causes numbered 5757 and 5758 subject, however, as provided in the succeeding paragraph hereof, to the right of any party hereto to a review by the Supreme Court of the United States of the judgment and decision of this court.

Fifth: That when this Court shall have rendered its decision and judgment in said cause #5756, no final order or judgment shall be made or entered in this court in said causes 5757 and 5758, until the period provided by law and the rules or orders of the court during which an application for certiorari may be made to the United States Supreme Court shall have elapsed; and if such application for certiorari shall have been made by any of the parties hereto, then not until said United States Supreme Court shall have acted upon said application for certiorari by either denying or granting the same; and if said application for certiorari to the United States Supreme Court shall have been granted by that court, then not until said cause shall have been finally determined by said Court and a final judgment entered therein by said court, whereupon final judgment of said Supreme Court in said cause #5756 shall be binding on the parties to said

causes #5757 and #5758 and judgment shall be entered in said causes in this court and/or in the United States District Court wherein said causes were tried in conformity with the judgment of the Supreme Court in said cause #5756.

Sixth: That this stipulation together with the order entered thereon shall be printed by the Clerk of this court and bound as a part of the printed transcript of record in cause #5756.

JULIUS MOSES,
Attorney for Sam Howard.
LLOYD HETH,
WM. P. SMITH,
Attorneys for Continental Casualty Company.
GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
Attorneys for Chester A. Willoughby.

(Indorsed): U. S. Circuit Court of Appeals * * (Caption—5756) * * Stipulation Julius Moses, Wm. P. Smith & Lloyd Heth. Filed Feb 19 1936 Frederick G. Campbell, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS. Entered Feb. 19, 1936.

* * (Caption—5756; 5757; 5758) * *

Wednesday, February 19, 1936. Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

ORDER.

This cause having come on to be heard before this court this 19th day of February, 1936, upon the stipulation of the parties hereto,

It Is Ordered, Adjudged and Decreed: that

1. The causes pending in this court described in the caption be and the same are consolidated for hearing and argument.

2. The Clerk of this court is hereby directed to cause to

be printed the transcript of record filed in the cause in this court described as cause #5756 only, and shall not cause to be printed transcripts of record filed herein in the causes described in this court as #5757 and #5758, except the motion for new trial filed October 2, 1935, shown as #18 of the praecipe for record filed in cause #5757, which said motion for new trial the Clerk shall cause to be printed and bound with the transcript of record in said cause #5756.

3. The hearing in said consolidated causes before this Court shall be had upon the said printed transcript of record in cause #5756 with said motion for new trial in said cause #5757 included therein.

4. The final decision and judgment of this court in cause #5756 shall be binding and conclusive upon the parties hereto in the said causes numbered #5757 and #5758 subject, however, as provided in the succeeding paragraph hereof, to the right of any party hereto to a review by the Supreme Court of the United States of the judgment and decision of this court.

5. When this Court shall have rendered its decision and judgment in said cause #5756, no final order or judgment shall be made or entered in this court in said causes #5757 and #5758, until the period provided by law and the rules or orders of the court during which an application for certiorari may be made to the United States Supreme Court shall have elapsed; and if such application for certiorari shall have been made by any of the parties hereto, then not until said United States Supreme Court shall have acted upon said application for certiorari by either denying or granting the same; and if said application for certiorari to the United States Supreme Court shall have been granted by that court, then not until said cause shall have been finally determined by said Court and a final judgment entered therein by said court, whereupon final judgment of said Supreme Court in said cause #5756 shall be binding on the parties to said causes #5757 and #5758 and judgment shall be entered in said causes in this court and/or in the United States District Court wherein said causes were tried in conformity with the judgment of the Supreme Court in said cause #5756.

6. That this order, together with the stipulation upon which this order has been entered shall be printed by the Clerk of this court and bound as a part of the printed transcript of record in cause #5756.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing Printed pages, numbered from 1 to 386, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-sixth day of February, 1936, upon which the following entitled cause was heard and determined:

Sam Howard and Continental Casualty Company, a corporation,

Appellants,

vs.

The United States of America on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, *et al.*,

Appellees,

No. 5756, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 10th day of March, A. D. 1937.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the first day of October, 1935, of the October Term, in the year of our Lord one thousand nine hundred and thirty-five, and of our Independence the one hundred and sixtieth.

Sam Howard and Continental Casualty Company, a corporation, *Appellant,*

5756 *vs.*

The United States of America on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the fourth day of February, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5756. October Term, 1935.

Sam Howard and Continental Casualty Company,

vs.

The United States of America on relation of Chester A. Willoughby as Trustee in Bankruptcy of National Mechanical Service Company, *et al.*

The Clerk will enter our appearance as counsel for Appellants.

JULIUS MOSES,
231 So. La Salle St.,
LLOYD HETH,
1 No. La Salle St.,
WILLIAM P. SMITH,
910 So. Michigan Ave.,
Chicago, Illinois.

Endorsed: Filed February 4, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the nineteenth day of February, 1936, there was filed in the office of the Clerk of this court, a Stipulation Re: Printing Record, which said Stipulation is not copied here as the same appears on pages 383 to 385 inclusive, of the printed record in this cause, certified herewith under separate certificate.

And on the same day, to-wit: On the nineteenth day of February, 1936, an Order was entered as to Printing Record, etc., which said Order is not copied here as the same appears on pages 385 and 386 of the printed record in this cause, certified herewith under a separate certificate.

And afterwards, to-wit: On the twenty-seventh day of February, 1936 there was filed in the office of the Clerk of this court, an appearance of counsel for appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5756. October Term 1935.

Sam Howard and Continental Casualty Company,

vs.

The United States of America on relation of Chester A. Willoughby, as Trustee *et al.*

The Clerk will enter our appearance as counsel for appellees.

GEORGE B. MCKIBBIN,
WALTER E. BEEBE,
HAMILTON K. BEEBE,
231 So. La Salle St.,
Chicago, Illinois.

Endorsed: Filed February 27, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the nineteenth day of May, 1936, the following further proceedings were had and entered of record, to-wit:

Tuesday, May 19, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Sam Howard, *et al.*,
5756 *vs.*
The United States of America on relation of Chester A. Willoughby, as Trustee, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Lloyd Heth and Mr. Julius Moses, counsel for appellants, and by Mr. Walter E. Beebe, counsel for appellees, and the court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the fifth day of October, 1936, the following further proceedings were had and entered of record, to-wit:

Monday, October 5, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

Sam Howard, *et al.*,
5756 *vs.*
The United States of America on relation of Chester A. Willoughby, as Trustee, *et al.*,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is now here ordered that the order taking this cause under advisement be, and the same is hereby set aside; and that this cause be, and the same is hereby restored to the calendar for hearing.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the sixth day of October, 1936, of the October Term, in the year of our Lord one thousand nine hundred and thirty-six, and of our Independence the one hundred and sixty-first.

And afterwards, to-wit: On the eighteenth day of November, 1936, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 18, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

5756	Sam Howard, *et al.*, *vs.* The United States of America on relation of Chester A. Willoughby, as Trustee, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral arguments by Mr. Lloyd Heth and Mr. Julius Moses, counsel for appellants, and by Mr. Walter E. Beebe, counsel for appellees, and the court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the eighth day of January, 1937, there was filed in the office of the Clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5756. October Term, 1936, October Session, 1936.

SAM HOWARD and CONTINENTAL CASUALTY COMPANY, a Corporation, *Appellants,*

vs.

THE UNITED STATES OF AMERICA on relation of CHESTER A. WILLOUGHBY, as Trustee in Bankruptcy of National Mechanical Service Company, a Corporation, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

January 8, 1937.

Before EVANS, *Circuit Judge,* and LINDLEY and BRIGGLE, *District Judges.*

LINDLEY, *District Judge.* This is an appeal from a judgment of the District Court entered in a consolidated cause in which were merged three suits brought upon several bonds of Howard, as receiver and trustee in bankruptcy, and Continental Casualty Company, as surety, to recover moneys held by such trustee and receiver in bankruptcy on deposit in the Phillip State Bank of Chicago at the time it closed in 1932. Following verdict of the jury, judgment was rendered for $225,740.45.

The condition of each of the trustee's bonds was as follows:

> "NOW, THEREFORE, if the said Sam Howard, Trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said Bankrupt, which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise to remain in full force and virtue."

That of each of the receiver's bonds was as follows:

> "NOW, THEREFORE, the condition of this obligation is such, That if the said Sam Howard shall faithfully discharge the duties of his trust as such Receiver, and shall well and truly account for all moneys and property that shall come into his hands, and shall abide by and perform all things which he in said order is instructed to do or shall hereafter be by the Court commanded to perform, then this obligation shall be void, otherwise to be in full force and effect."

The complaint charged that Howard negligently, carelessly and improperly deposited in said bank, in his name as receiver and trustee for bankrupt estates, the funds in controversy; permitted said moneys to remain on deposit, and, during said period, deposited further moneys and opened deposit accounts for new estates, when ordinary care and prudence would have required that he desist from such practice and take care that the total deposits in all the estates should not exceed in amount the penalty of the depository bond of $50,000.

The case was tried upon the theory that liability of appellants on the bonds was to be resolved by a determination of whether, under the evidence, Howard had been negligent in making and maintaining deposits of estate funds in the bank. It was the position of appellees, adopted by the court in the trial, that such negligence, if proved, was a breach of the conditions of each of the bonds; and the court, in its charge to the jury, submitted the question of liability upon this premise. It advised the jury that the trustee was bound to exercise reasonable care,—the care of a reasonably prudent man, acting as a fiduciary of trust funds.

Appellants contest vigorously the correctness of this theory. They assert that there is no liability upon the bonds because of any lack of due care or diligence upon the part of the trustee, other than the express conditions themselves import. It becomes incumbent upon us, therefore, to determine the extent of liability upon the written instruments and whether the court was in error in its conception of the legal obligation of the principal and surety upon official bonds.

Howard had, for a number of years, been appointed receiver and trustee in bankruptcy cases in the District Court. He formerly kept deposits in the Central Trust Company, one of the designated official depositories. In July, 1930, one Beutel, who had been an official of the Central Trust Com-

pany, became president of the Phillip State Bank, on the north side of Chicago, which had been in business for some fifteen years. It was associated in some degree with the Central Trust Company. Beutel suggested that Howard make deposits in the Phillip Bank. Later that bank applied for designation as an official depository of bankruptcy funds, and the court entered an order designating it as such, requiring a bond of $50,000, as such depository, to be executed and filed with the court. The bank qualified under this order, and thereafter from time to time Howard deposited moneys in the bank until it closed in 1932.

In December, 1930, the bank's resources were about $4,600,000, deposits $3,600,000, capital stock, surplus, and undivided profits $752,000. In the middle of April, 1931, within five days, four banks in the same general community closed their doors, and at that time depositors of the Phillip Bank withdrew $1,000,000 in deposits. The president telephoned Howard and other large depositors of the bank and told them not to feel concerned; saying that the bank was safe and sound and that the Central Trust Company was advancing all cash necessary to meet demands. The Phillip Bank at that time borrowed from the Central Trust about $1,000,000. Two months later this loan had been repaid and deposits were beginning to return to the bank. On June 7, 1931, in an attempt to save its depositors, the National Bank of the Republic merged with the Central Trust Company, and the Foreman State National Bank was taken over by the First National Bank. Following this, on the north side of Chicago, five banks closed, and a new run began on the Phillip Bank and about $500,000 was withdrawn.

Shortly thereafter the court requested of all trustees a statement of their bankruptcy estate deposits. Howard filed a report showing $373,000 deposited in his official accounts in bankruptcy in the Phillip Bank. The District Court, on June 11, directed all receivers to file every three months an official statement showing deposits in banks. Evidence offered, but refused by the court, disclosed that the National Bank of the Republic had similar deposits of $1,103,000, with a depository bond of $50,000; and the Foreman Bank $331,000, with a depository bond likewise of $50,000.

The quarter-annual statement of the Phillip Bank issued in early July showed that the deposits had increased after March 25 about $1,300,000.

The then existing relationship between Howard and the

bank continued through the summer and fall of 1931. In October the bank's deposits were $2,335,000. The total resources had decreased about $196,000—from $3,660,000 to $3,464,000. The situation did not change materially from September, 1931, until June, 1932. There were many withdrawals about Christmas of 1931. On June 18, 1932, The Devon Trust and Savings Bank closed. A run started on the Phillip Bank; on the following Monday, June 20, it continued, and on June 21 the bank closed. It has since been in the hands of a receiver.

The proof showed that Howard was a borrower at the bank to the extent of some $9,000. This evidence was offered on the theory that the existence of such loans prevented Howard from being a free agent, in depositing official funds. These loans, he said, were necessary to furnish him with working capital in handling estates, to supply constantly recurring petty expenses for which he received credit and reimbursement upon report to the court and approval thereof.

It appears that Howard knew of the runs that were made upon the bank. He borrowed funds, as he said, to effectuate an efficient administration of the estates. With this knowledge, his deposits were not withdrawn, and some new accounts were created. These facts, it is argued, placed him in a position where failure to act, was a breach of the diligence and care which he should have exercised as a fiduciary.

We must keep in mind that we are not concerned here with the question of liability of Howard himself to the estates for which he was fiduciary. The question presented to us is the much more narrow one of whether the condition of the bonds sued upon has been broken. We are dealing, not with an action in tort against the trustee, but with the legal liability of a principal and a surety upon an express contract.

The obligors bound themselves to pay losses which might arise (1) from failure of Howard to obey an order of the court; (2) from failure upon his part faithfully and truly to account for the moneys of the estates; and (3) from failure by him faithfully to perform "his official duties as said Trustee." The obligation on the receiver's bonds was, in legal intendment, the same as that upon trustee's bonds.

There is no evidence of breach of condition (1). There is no proof of violation of any order of the District Court or of any loss to an estate arising from disobedience of any court order.

It is contended that the second condition was broken; that

Howard did not faithfully and truly account for the moneys of the estates. This language imposes upon the trustee the duty to make honest and accurate reports or accountings of estate funds as required by law, and to dispose of the funds so reported or accounted for in accordance with the law. There is no proof that Howard failed to make or render reports or accounts according to law or that his disposition of the funds, as thus reported and accounted for, was contrary to law, unless it can be successfully maintained that it was his duty to discover an alleged dangerous banking condition and to remove the funds beyond danger therefrom, a phase we shall hereafter discuss. There is no charge of defalcation, embezzlement or other improper distribution of funds.

There remains to be considered the third proviso of the conditions. This is of wide import, and liability attaches thereunder for any loss which may result from a failure faithfully to perform official duties. It is provided under section 47 of the Bankruptcy Act, as to the official duties of the trustee with relation to the handling of funds, that the trustee shall—

> "Deposit all money received * * * in one of the designated depositories", (11 U. S. C. A. 75 (a) (3).
>
> "Disburse money only by check or draft on the depositories in which it has been deposited"; (11 U. S. C. A. 75 (a) (4).
>
> "Furnish such information concerning the estates * * * and their administration as may be requested by parties in interest"; (11 U. S. C. A. 75 (a) (5).
>
> "Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts"; (11 U. S. C. A. 75 (a) (6).
>
> "Lay before the final meeting of the creditors detailed statements of the administration of the estates"; (11 U. S. C. A. 75 (a) (7).
>
> "Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors"; (11 U. S. C. A. 75 (a) (8).
>
> "Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after * * * appointment and every two months thereafter, unless otherwise ordered by the courts." (11 U. S. C. A. 75 (a) (10)).

General Order 29 in bankruptcy provides that the trustee

shall distribute money only by check countersigned by a judge or referee or clerk, as designated. The rules of the District Court provide that the referee shall countersign all checks. The narrow question presented, then, as we view it, is whether, assuming for disposition of this inquiry that Howard was negligent in making and maintaining deposits in the Phillip Bank, such negligence was a violation of his official duties, and whether it created a liability against a surety for performance only of such official duties.

A surety on such a bond undertakes that the officer will faithfully perform the duties stated and defined by law as pertaining to his office. He does not consent to become liable for any act in which the officer may become engaged in the pursuit of his office. Otherwise stated, an officer may so act as to render himself personally liable as a matter of general law, but it does not follow necessarily that his official bondsmen are liable. The liability of sureties is limited to that for breach of official duties of the principal, and does not include an undertaking against every act that the official may perform or every failure to act of which he may be guilty. *City of Salisbury* v. *Lyerly,* 208 N. C. 386; *District of Columbia* v. *Petty,* 229 U. S. 593; *Orton* v. *City of Lincoln,* 156 Ill. 499; *Campbell* v. *American Bonding Co.,* 172 Ala. 458; *City of Parsons* v. *Fidelity & Deposit Co.,* 29 F. (2d) 417, reversed on other grounds, 43 F. (2d) 315. Thus in *City of Wilkes Barre* v. *Rockafellow,* 171 Pa. St. 177, the court said:

> "The terms must receive a reasonable construction, and, if there has been no violation of official duty, there has been no breach of the condition for which the sureties can be required to account. It follows, necessarily, that for an extraofficial act or undertaking of the principal the sureties cannot be held responsible. 2 Am. & Eng. Enc. Law, 467b. And if the ordinary course of official action is departed from, for the benefit and at the instance of the party to whom the bond is given, and loss results, the sureties are not, in law or morals, responsible for such loss, unless they assented to the departure from the ordinary course of official action which made the loss possible."

Contracts of sureties on official bonds are *strictissimi juris.* The instrument is required by a statute which defines its terms, and the law of the office is a part of the contract. The surety guarantees the faithful discharge of all duties properly pertaining to the office, and the extent of such liability

can be determined only from the bond and from the statutes creating the office and defining the terms of the bond. See *Lowe* v. *City of Guthrie*, 4 Okla. 287. That these bonds are such statutory official bonds appears from the provisions of section 50 of the Bankruptcy Act, as follows:

> "Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the Court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties."

The trustee's official duties are defined elsewhere in the act as above indicated. All funds coming into his hands must be deposited in a designated depository; and he can withdraw no part thereof except by order of court or upon check countersigned by a referee, pursuant to an order of court authorizing the same. Obviously he would become liable upon his bond if he should deposit estate moneys in some bank other than a designated depository. But can it be said that under his official duties, with which alone we are dealing, he is bound to investigate the financial condition of a designated, qualified depository named by the court to whose jurisdiction he is subject?

There are some cases where the courts have imposed an absolute liability for public funds upon the principal and the surety; but in none of these, we believe, did a situation exist such as confronts us here. In the case of a common law fiduciary or a quasi-public official, whose actions are not governed by statute in the same sense as a trustee in bankruptcy, a failure to exercise ordinary care and prudence creates liability.[1] But in none of the cases cited in this connection was the officer acting under a legal depository system such as controls in bankruptcy. In all cases which involve some depository system set up by statute for the safe-keeping of

1. *Barney* v. *Saunders*, 57 U. S. (16 How.) 535; *Anguera* v. *Yturria*, 80 F. (2d) 57 (C. C. A. 5); *Carey* v. *Safe Deposit & Trust Co. of Baltimore*, (Md.) 178 Atl. 242; *Neff* v. *Harmon*, 145 Okla. 114, 291 Pac. 518; *In re Stone's Assignments*, (Ia.) 264 N. W. 604; *In re Kohler's Estate*, 15 Wash. 613, 47 Pac. 30; *In re Workmen's Estate*, 196 (Ia.) 1108, 196 N. W. 35; *Hart* v. *Savary*, 114 Fla. 41, 152 So. 705; *In re Olson's Estate*, 206 Ia. 706, 219 N. W. 401; *Harper* v. *Betts*, 177 Ark. 977, 8 S. W. (2d) 464; *In re Welch's Estate* (Mont.) 45 Pac. (2d) 681; *Wilson* v. *People*, 19 Colo. 199, 34 Pac. 944; *State* v. *Copeland*, 96 Tenn. 296, 34 S. W. 427; *Town of Danbury* v. *Riedmiller*, 208 Ia. 879, 226 N. W. 159; *State* v. *Gramm*, 7 Wyo. 329, 52 Pac. 533, 40 L. R. A. 690.

funds, we find it characteristically true that there is a divided authority over the funds so in safe-keeping, lodged in different persons. The fiduciary who receives the funds and is invested with disbursing power is not permitted to retain the funds in his own possession; rather, he is required to deposit them in a depository designated by some official other than himself for that purpose, and he can not properly make deposits or place funds elsewhere. The power to select and designate the depository, and to revoke such action, is lodged with some one other than the officer who receives the funds. These features, with the concurrent division of power, have led the courts to conclude that the intent of the legislative body in such statutes is to impose no liability on the depositing officer who complies with the law in making his deposits, in the event of a loss through the closing of a depository. If he has authority to select the depository, and no other body has any power of such selection, he is not relieved. *State* v. *Bobleter,* 83 Minn. 479. And depositing estate funds in a bank will not save a trustee from the illegality of deposit if the bank is not a designated depository. *In re Potell,* 53 F. (2d) 877; *In re Hoyt,* 119 Fed. 987. It has been held that he is not relieved, even though the court direct him to make the deposit in a non-designated bank. *Huttig Mfg. Co.* v. *Edwards,* 160 Fed. 619; *Reynolds Tobacco Co.* v. *Jones Co.,* 54 F. (2d) 329. But he needs no further order to protect him if he deposits in a designated depository. *In re Singer Furniture Corp.,* 47 F. (2d) 780. Nor is the size of the bond a warning to him of the amount he may deposit in a depository. *City of Billings* v. *Mass. Bonding & Ins. Co.,* 88 Mont. 91. This court said, in *Illinois Surety Co.* v. *United States,* 226 Fed. 665:

> "In support of the first contention, it is urged that, as the court may from time to time order an increase in the amount of the bond, every depositor, before making his deposit, must ascertain whether the amounts then owing might exhaust the penalty, and, in that event, he must see to it that an increase of the bond is ordered, if he desire to share in the protection.
>
> "The statement of the proposition carries its own refutation. No such limitation is expressed in, and none assuredly will be implied from, the language either of the statute or of the bond itself."

Designated depositories are themselves officers of the court. *State of Kansas* v. *U. S. Fid. & Guar. Co.,* 81 Kan. 660, 106

Pac. 1040, 26 L. R. A. (N. S.) 865; *State* v. *U. S. Fid. & Guar. Co.*, 210 Wis. 178, 246 N. W. 434; *Miller* v. *Batson*, 160 Miss. 642, 134 So. 567; *Perkins* v. *State*, 130 Miss. 512, 94 So. 460; *Board of County Com'rs.* v. *Mason*, 38 Wyo. 1, 264 Pac. 93. But funds deposited with them are withdrawn from *custodia legis* and become simple debt claims against the banks. *Gardner* v. *Chicago Title & Trust Co.*, 261 U. S. 453; *In re Ecklund*, 75 F. (2d) 747 (C. C. A. 7).

In *Hamden* v. *American Surety Co.*, 9 Fed. Supp. 733, the court aptly said:

> "It thus is inherent in the federal system that federal funds coming into the hands of a receiving officer, when once deposited with a duly designated depository of the United States, are in effect in the treasury of the United States and hence no longer in the possession or custody of that receiving officer. See *Branch* v. *U. S.*, 100 U. S. 673, 25 L. Ed. 759. And the same situation exists with reference to public funds on deposit with a federal depository awaiting disbursement by an official disbursing officer. Thus, in the ordinary case no question can arise as to the liability of a federal receiver of public moneys or of a federal disbursing officer, for funds deposited with a duly designated depository."

To the same effect is *City of Scranton* v. *Aetna Casualty & Surety Co.*, 11 Fed. Supp. 986.

We agree that when such depositories have been designated according to law, the depositing officer and his bondsmen are not liable upon an official bond for the loss of funds deposited therein resulting from the closure of the depository, so long as the depositor deposits in an institution designated by the court. Compliance with what the Legislature or the court directs furnishes protection to an obedient officer. Cases thus holding are cited in the foot note.[2] What the appellees ask "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably (possibly) by inadvertence, may be included within its scope. To supply omissions transcends the

2. *Hinton* v. *State of Oklahoma*, 57 Okl. 777; *American Surety Co. of N. Y.* v. *City of Thomasville*, 73 F. (2d) 584 (C. C. A. 5); *Edgerton Independent Consol. School District* v. *Volz*, 50 S. D. 107; *Perley* v. *County of Muskegon*, 32 Mich. 132; *Board of Education* v. *Nelson*, 33 N. D. 462; *Commonwealth* v. *Godshaw*, 92 Ky. 435, 17 S. W. 737; *Magee* v. *Brister*, 109 Miss. 183; *Board of Finance* v. *First National Bank*, 71 Ind. App. 290; *Miller* v. *Batson*, 160 Miss. 642, 134 So. 567; *City of New Haven* v. *Fresenius*, 75 Conn. 145; *Joint School District No. 105* v. *First National Bank*, 125 Okla. 243.

judicial function." *Wallace* v. *Cutten,* 298 U. S. 229; *Iselin* v. *United States,* 270 U. S. 245, 250-251. Some states expressly exonerate the depositing officer from liability by statute. A specific example is *State* v. *Bowers,* 70 Ohio St. 423.

This trustee was bound to deposit, and did deposit, his funds in a qualified depository designated by the court. Under the Bankruptcy Act he could withdraw no part of any of the deposits and distribute no funds therefrom except upon an order of court and upon check duly countersigned by a referee. It follows, therefore, that so far as his official duties were concerned, and so far as the liability of the surety for his official acts is concerned, he fully complied with the law, and there was no breach of the third condition of the bond. It was the duty of the District Court to direct a verdict for the defendants, rather than to submit to the jury the question as to whether the trustee was negligent in making deposits in a designated depositary.

Howard's knowledge of the condition of the bank and his personal loans there, are to our mind facts immaterial in an action upon these bonds. They constitute no breach of the conditions. What their legal effect may be in an action against the trustee personally, we are not called upon to decide.

In view of our conclusions, the discussion of other features is unnecessary.

The judgment of the District Court is reversed with directions to grant a new trial and to proceed in accordance with this opinion.

EVANS, *Circuit Judge,* dissenting. I find myself impelled to dissent on the ground that the record shows the obligation of appellant's principal was breached. The trustee's (appellant's) obligations, which measured the surety's liabilities, were to (a) obey all court orders, (b) account for moneys of the estate, and (c) perform all official duties as trustee.

It is not possible to construe the measure of liability of a trustee set forth in (c) as being the same as imposed by (a) or (b).

What then were the *official duties* of the trustee?

They were obviously not restricted to carrying out the express orders of the court nor were they limited to the affirmative duties specified in the statute and confined to keeping accounts. I can not agree that a trustee in every case meets the requirements of his official duties when he deposits

the money by him collected in *any* bank named as a depository.

In other words, a trustee is one who occupies a fiduciary relation towards the creditors of the bankrupt. His is a position of trust. When the trustee, Howard, arranged with the bank to get a personal loan for a substantial sum and in return agreed to deposit the moneys which belonged to the creditors of the various estates for which he was trustee in the bank that loaned him personally the money, he failed in his plain duty to the creditors. He could not avoid the consequences of that failure if loss resulted through a failure of the bank, by showing that the bank wherein the money was deposited was a bank of deposit.

I can not agree that the personal loan to the trustee is of no moment in this case. It may not be determinative, it is true, but such a loan created a conflict of interest between Howard, the borrower, and Howard, the trustee. It undoubtedly influenced him, as trustee, when it came to keeping the creditors' money in the bank and also accounts for his not distributing the funds to creditors as promptly as he should have done. At least, any fact finding body might well have so found. Why didn't Howard distribute the large sums he had on deposit among the creditors to whom they belonged? With creditors sadly in need of the dividends, with the danger of bank failures facing him on all sides, with *all* of his deposits in *one* bank, the total amount of which was nearly ten times the amount of the bond which the bank executed, it was most natural for a *diligent* trustee to distribute the money to those entitled to it as *fast* as *possible*. On the other hand, distribution of the cash would have reduced the bank's deposits, which were already at the vanishing point. It was to the bank's interest to keep the money on deposit. Howard, as trustee, was the only substantial depositor left. Can reasonable men differ as to the influence and effect of that personal loan on Howard's action?

In performing the official duties mentioned in the bond, where there are many banks of deposit in the district and banks are closing almost daily, the plain duty, it seems to me, of the trustee was to select the bank which he would have chosen were he depositing his own money. Certainly no lesser degree of responsibility for a trustee may safely be announced. It is quite impossible, upon the record before us, to say that Howard used the same diligence in depositing *all* the moneys of *all* the accounts in this one little

out-lying bank where deposits had been greatly reduced that he would have used had he been handling his own funds. In fact, it is the conclusion of common sense that as an individual he would not have deposited any part of it there in the first place, and he would not have left it there when the constant crashing of banks directed thoughts of those with funds to the security of their deposits. I cannot believe Howard would have left the money in this bank save for the existence of his own unsecured note to the bank.

Much stress is placed upon the fact that the trustee sought the advice of the then District Judge and from him secured oral approval of his action in leaving the creditors' money on deposit in the Phillip State Bank. Doubtless, protection might have been secured through court action especially if the orders were made on notice to creditors.

It is significant, however, that no claim is made that a written order was entered or that a minute of any oral order was made by the clerk. While a written order was perhaps not necessary, it would have established the fact far more conclusively. As it now stands the jury might well have doubted or disbelieved Howard's story. The judge, who it is asserted gave his approval, did not testify, and it is not even claimed that in approving Howard's continued deposit in this bank the District Judge knew of the personal loan of said bank to Howard or that *all* of the funds of *all* the estates wherein Howard acted as trustee were thus deposited. Nor did he know that the total deposits exceeded the bank's bond nine times.

In a matter of such importance we can hardly accept as conclusive on the question of trustee's performance of duty the statement of the existence of an *ex parte* order alleged to have been made by the court, which order was neither reduced to writing nor a minute made of it by the clerk, and which involved nearly a half million dollars and dealt with the performance of an official duty. In any such order the creditors had an interest, and it is not imposing too strict a responsibility on the trustee to hold that a court order should afford him protection only when made on notice to creditors. As a proper protection to the court, who without it may be easily misrepresented, and also in fairness to the court's appointee, who is entitled to protection when the future realizations prove false the present expectations, such orders should be in writing and entered only upon notice to parties who have appeared.

Appellant's statement and argument that the note which he gave to the bank was for moneys borrowed by him in order to permit him to more effectively administer the bankrupts' estates entrusted to his care and that all other individuals who are regularly appointed trustees in bankruptcy by the District Judges of the Northern District of Illinois borrow money from the banks and give their unsecured notes therefor, with the understanding that the money coming into the trustee's possession will be deposited in said bank, must be rejected because of lack of factual support. Moreover, if all the other trustees are so obtaining personal credit on the strength of the use (or misuse) of their official position, the present affords a good opportunity to put a stop to the practice by a pronouncement of judicial, unequivocal condemnation thereof.

My conclusion is that the District Court properly submitted to the jury the question of fact arising out of Howard's alleged breach of official duties for which appellants were surely liable.

Endorsed Filed January 8, 1937. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the eighth day of January, 1937, the following further proceedings were had and entered of record, to-wit:

Friday, January 8, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

Sam Howard and Continental Casualty Company, 5756 *vs.* The United States of America, on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof:- It is now here ordered and adjudged by this court that the Judgment of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with directions to grant a new trial and to proceed in accordance with the Opinion of this court.

And afterwards, to-wit: On the twenty-sixth day of January, 1937, there was filed in the office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the twenty-ninth day of January, 1937, the following further proceedings were had and entered of record, to-wit:

Friday, January 29, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

5756	Sam Howard, *et al.*, *vs.* The United States of America on the relation of Chester A. Willoughby, as Trustee, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the Petition for a Rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 389 to 406, inclusive, contain a true copy of the proceedings had and papers filed (excepting Briefs of counsel, orders extending time to file Briefs, and Petition for Rehearing): in the case of

Sam Howard and Continental Casualty Company, a corporation,

Appellant,

vs.

The United States of America on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, *et al.*,

Appellees,

No. 5756, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 10th day of March, A. D. 1937.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S
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APR 20 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. [redacted] 30

UNITED STATES OF AMERICA, on relation of Chester A Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al.,

Petitioners,

vs.

SAM HOWARD and CONTINENTAL CASUALTY COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALTER E. BEEBE,
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SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari:
- Statement of Matters Involved 2
- Reasons for Granting the Writ 8

Brief in Support of Petition 11
- Opinions Below 11
- Jurisdiction 11
- Statement of the Case 11
- Specifications of Error 12
- Summary of Argument 13

Argument:

I. The Circuit Court erred in setting aside the judgment in the District Court, based upon the verdict of the jury 15

II. A failure to exercise ordinary care in the performance of a stautory duty is a breach of a bond requiring that an official shall in all respects faithfully perform all his official duties as a trustee and the duties of his trust 18

III. The jury, under suitable instructions, found that Howard had breached his official bonds .. 21

IV. The public fund depository system (31 U. S. C. A. Sec. 476) and the plan provided in Section 47 of the Bankruptcy Act (11 U. S. C. A. Sec. 75) and Section 61 of the Bankruptcy Act (11 U. S. C. A. Sec. 101) have no relation to each other 25

PAGE

V. No precedents can be obtained from the decisions, as to the liabilities of sureties upon official bonds for public funds under State statutes, which are of any benefit in the general consideration of the rules regarding liability for the loss of bankruptcy deposits in bankruptcy depositories 28

VI. Neither the Congress of the United States nor the State Legislatures can constitutionally relieve public officials or quasi-public officials of the United States or the States from the result of their negligence..... 30

VII. Howard violated each of the bonds that he gave as trustee and receiver, and his surety is liable for loss resulting from each of such violations 32

CASES CITED.

American Surety Company of New York v. Akron Savings Bank Company, 74 Ohio St. 465, Aff. 212 U. S. 557, 53 L. Ed. 651..... 19

Angle v. Chicago, St. P. M. & O. R. Co., 151 U. S. 1, 38 L. Ed. 55, 65..... 31

Bennett v. Weber, 323 Ill. 283, 294, 154 N. E. 105, 109.. 24

Booth v. Greer Investment Co., 52 Fed. (2d) 857, 860 (D. C. Okla.)..... 24

Boyden v. U. S., 13 Wall. 17, 20 L. Ed. 527..... 28

Coder v. McPherson, 152 Fed. 951 (C. C. A. 8th C.).. 25

Edwards v. Logan County, 244 Ky. 296, 50 S. W. (2d) 83 24

PAGE

Essex National Bank v. Hurley, 16 Fed. (2d) 427 (C. C. A. 1st C.) 24

Fidelity & Deposit Co. v. Redfield, 7 Fed. (2d) 800 (C. C. A. 9th C.) 24

Florida Bank & Trust Co. v. Union Indemnity Co., 55 Fed. (2d) 640 (C. C. A.) 19

Grandison v. National Bank of Commerce, 231 Fed. 800, 809 (C. C. A. 2d C.) 25

Hale County, Texas v. American Indemnity Co., 63 Fed. (2d) 275, 279 (C. C. A.) 22

Hamden v. American Surety Co., 9 Fed. Supp. 733, 738 28

In re Hoyt, et al., 119 Fed. 987 23

Jordon v. Baker, 252 Ky. 40, 66 S. W. (2d) 84, 93 A. L. R. 813 24

Martin v. Federal Surety Co., 58 Fed. (2d) 79 (C. C. A. 8th C.) 25

Mass. Bonding & Ins. Co. v. Steele, 125 Neb. 7, 248 N. W. 648 20

McClean v. Bradley, 282 Fed. 1011, Aff. 299 Fed. 379 (C. C. A. 6th C.), Cert. Den. 266 U. S. 619, 69 L. Ed. 471 25

Muir v. L. & N. Ry. Co., 247 Fed. 888, 897 31

Roberts County v. Wickard, 53 S. D. 511, 221 N. W. 246 20

In re Singer Furniture Corporation, 47 Fed. (2d) 780, 784 21

State v. Carney, 208 Ia. 133, 217 N. W. 472 20

State v. McNamer, 62 Mont. 490, 205 Pac. 951 24

State v. U. S. Fidelity & Guar. Co., 210 Wis. 178, 246 N. W. 434, 436 20

U. S. v. Perkins, 280 Fed. 546 (C. C. A.) 23

U. S. v. Thomas, 15 Wall. 337, 21 L. Ed. 89 28

Wiley v. Sparta, 154 Ga. 1, 114 S. E. 45, 25 A. L. R. 1342 28

Statutes Cited.

	PAGE
11 U. S. C. A. Sec. 75	19
11 U. S. C. A. Sec. 75 (Section 47 of the Bankruptcy Act)	25
11 U. S. C. A. Sec. 75 (a) (3)	16
11 U. S. C. A. Sec. 101 (Section 61 of the Bankruptcy Act)	25
12 U. S. C. A. Sections 391, 392	29
31 U. S. C. A. Sec. 476	25
31 U. S. C. A. Sec. 521	29

Text Books Cited.

38 American Law Reports, page 1513	30
93 American Law Reports, page 819	26, 29
Black, Const. Law, 3rd Ed., page 602	31
2 Cooley on Const. Lim., page 758 (8th Ed.)	31
12 Corpus Juris, Sec. 551, page 972	31
25 Corpus Juris, page 1118	23
46 Corpus Juris, Sec. 28, page 543	24
46 Corpus Juris, Sec. 398, page 1068	24
46 Corpus Juris, Sec. 401, page 1069	24, 26
53 Corpus Juris, Sec. 194, page 156	24
65 Corpus Juris, Sec. 520, page 652	24
65 Corpus Juris, Sec. 566, page 701, and Sec. 519, page 647	24
1 Corpus Juris Secundum, page 576	22
Gilbert's Collier on Bankruptcy, 2d Ed., Sec. 101 (b), page 929	23
22 Ruling Case Law, Sections 176, 178, 189, page 496; see, also, Perm. Supp. and 1936 Supp. under the same sections	26
22 Ruling Case Law, Sec. 190, page 507, note 2	26
22 Ruling Case Law, Sec. 197, page 496	19

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. _____

UNITED STATES OF AMERICA, on relation of Chester A Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al.,

Petitioners,

vs.

SAM HOWARD and CONTINENTAL CASUALTY COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, *et al.*, respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Sev-

enth Circuit to review a decree of that Court entered January 8, 1937, reversing a decree of the United States District Court for the Northern District of Illinois, Eastern Division (rehearing denied January 29, 1937). A certified transcript of the record in this case, including the proceedings in said Circuit Court of Appeals, is furnished herewith, in accordance with Rule 38, Paragraph 1, of the Rules of this Court.

STATEMENT OF MATTERS INVOLVED.

Because the above-entitled cause involves the question of liability of a trustee and his surety on official bonds filed in 114 separate bankrupt estates and of liability of a receiver and his surety on official bonds filed in 9 other separate bankrupt estates, a somewhat extended statement is necessary in order clearly to set forth the matters involved.

Three suits at law were brought in the United States District Court for the Northern District of Illinois, Eastern Division, in the name of United States of America on the relation of Chester A. Willoughby, acting in his official capacity as Trustee in Bankruptcy of certain bankrupt estates against Sam Howard, one of the respondents herein, upon his official bonds as Trustee in Bankruptcy in 114 separate bankrupt estates and as Receiver in Bankruptcy in 9 separate bankrupt estates, and against Continental Casualty Company, a corporation, the other respondent herein, as surety upon all of said official bonds.

During the month of May, 1934, Howard resigned as Trustee or Receiver in all of said estates and was succeeded by Chester A. Willoughby who, as such Trustee and Receiver, is the petitioner herein. All of said bankrupt estates were subject to the jurisdiction of the United States District Court for the Northern District of Illinois, Eastern

Division. These three suits involve all 123 of said estates, and, by agreement of all the parties, were consolidated for trial and tried by said District Court. (Tr. 51.)

Prior to August 25, 1930, Howard as trustee and receiver kept funds of his bankrupt estates on deposit in the Central Trust Company of Illinois and the Foreman-State National Bank, both of which were banking corporations located in Chicago, Illinois. (Tr. 169, 256-258.) He had personal unsecured loans of $2,500.00 at the Central Trust Company and of $7,000.00 at the Foreman Bank. (Tr. 258.)

Shortly prior to July 15, 1930, one Beutel, a vice-president of the Central Trust Company, advised Howard that he anticipated becoming president of the Phillip State Bank and Trust Company of Chicago (hereinafter called the "Phillip Bank") and invited said Howard to change his estate deposits from the aforesaid banks to the Phillip Bank (Tr. 164, 256), although at that time the Phillip Bank was not a depository qualified to accept the funds of bankrupt estates. (Tr. 143.) Howard replied that he was not a man of any means and if he transferred his estate deposits to the Phillip Bank he would wish to obtain an unsecured loan from that bank to liquidate his other loans above mentioned. (Tr. 257.) Said Beutel told Howard that the Phillip Bank would make him a loan so that he could liquidate said loans with the Central Trust Company and the Foreman Bank (Tr. 165, 257) and also would loan him such further sums as said Howard required to conduct his business.

As a result of said arrangement between Howard and said Beutel, the Phillip Bank loaned $5,000.00 to Howard on his unsecured note on August 6, 1930, and loaned him the further sum of $6,000.00 on August 19, 1930. (Tr. 77, 79, 258.)

Thereafter, on August 20, 1930, the Phillip Bank filed a bankruptcy depository bond for $50,000.00 (Tr. 113) and qualified to act as such depository. Between August 25, and August 31, 1930, Howard deposited in the Phillip Bank, in his capacity as receiver or trustee of said estates, the sum of $249,968.15. (Tr. 73.)

The last published statement of the financial condition of the Phillip Bank prior to the making of said deposits, was as of June 30, 1930, and showed liabilities of $4,367,897.93, of which $1,610,294.96 were demand deposits, and $1,858,-076.90 were time deposits. (Tr. 84.)

Commencing with the initial deposits of $249,968.15, the deposits in the Phillip Bank of Howard as trustee or receiver increased until at the time said bank failed on June 21, 1932, said deposits amounted to $416,833.90, the largest deposits Howard had in said bank at any time. (Tr. 72.)

The original personal unsecured loans of $11,000.00 made to Howard in August, 1930, increased to $18,515.00 on July 11, 1931, and amounted to $17,500.00 on June 21, 1932, the date said bank failed. (Tr. 77, 78.)

During the period that Howard was increasing his deposits as trustee and receiver in the Phillip Bank, said bank underwent five serious runs. A run in April, 1931 (Tr. 169) required the borrowing of $1,000,000.00. Another run occurred in June, 1931. (Tr. 171, 176.) A run in September, 1931 (Tr. 176; 177) required the borrowing of about $500,000.00; and a run in December of 1931, cost the bank $500,000.00. (Tr. 177.) The fifth run resulted in the failure of the bank on June 21, 1932. (Tr. 178.)

Howard had knowledge of each of these runs (Tr. 169, 171, 173, 176, 177, 192, 193) and discussed them with officers of the bank (Tr. 259-263), and, in addition, was charged with knowledge of the publications required by the Auditor

of Public Accounts of the State of Illinois of the condition of the bank (Tr. 271), said publications showing the condition of said bank as of the following dates: June 30, 1930 (Tr. 84); September 24, 1930 (Tr. 86); December 31, 1930 (Tr. 89); March 25, 1931 (Tr. 91); June 30, 1931 (Tr. 93); September 29, 1931 (Tr. 96); December 31, 1931 (Tr. 98); and March 30, 1932 (Tr. 100). Said statements in each instance were published shortly after the date as of which they were made. Howard indicated that he looked at the quarterly reports and then threw them away. (Tr. 271.)

While Howard was increasing the amount of estate moneys deposited in said bank and increasing his personal borrowings therefrom, its demand and time deposits as a whole were decreasing. On March 25, 1931, demand deposits were $2,481,918.79 and time deposits were $1,329,-720.39. (Tr. 92.) On December 31, 1931, demand deposits had decreased to $1,938,427.13, of which $252,461.18 were deposits of said Howard's estates, and time deposits had decreased to $655,357.11. (Tr. 72, 98.) At the time said bank closed the total deposits, both demand and time, were $2,101,710.51, of which $416,833.90 were deposits of Howard's estates. (Tr. 72.)

The moneys of 123 bankrupt estates here involved are a portion but not all of the estate moneys which Howard had on deposit with the Phillip Bank. (Tr. 72.)

After the failure of the Phillip Bank, its $50,000.00 depository bond was collected and paid in reduction of the loss to the bankrupt estates whose money was on deposit in said bank, which resulted in a distributive dividend to each of said estates of 11.0461% of the estate money on deposit. (Tr. 13-28, 61, 67.) The amount for which suit was brought in these cases was the amount on deposit in each of the estates here involved at the time the Phillip Bank failed, less the amount of such distributive dividend,

except in the case of estates in which the amount of the trustee's or receiver's bond was less than the amount on deposit after crediting the above-mentioned distributive dividend, in which case the amount sued for was the full amount of the bond. (Tr. 61-64, 67.) The amount sought to be recovered was $5,439.22 on the Trustee's bond in one suit (Tr. 61), $197,076.31 on 113 Trustee's bonds in another suit (Tr. 64), and $23,224.92 on 9 Receiver's bonds in a third suit (Tr. 67), an aggregate of $225,740.45.

The conditions of the official bonds of Howard as trustee or receiver were in substance that he and his surety were to be liable for losses resulting to said estates upon:

(a) Failure of Howard to obey any order of the Court.

(b) Failure of Howard faithfully and truly to account for all of the moneys, assets or effects of the estates.

(c) Failure of Howard in all respects faithfully to perform all of his official duties as trustee or receiver. (Tr. 59, 65.)

The complaint set forth in separate counts the deposit of each estate in the Phillip Bank and other factual data sufficient to establish the amount of the loss suffered by each estate as a result of the closing of said bank and the portion of such loss covered by Howard's official bonds. Said complaint also set forth the relationship of Howard to the Phillip Bank, the history of the runs thereon and the fact that Howard knew of the condition of said bank, and alleged that he negligently and carelessly permitted the moneys of said estates to remain on deposit in said bank, that he did not faithfully and fully account for the moneys of the estates, did not faithfully perform his duties as trustee or receiver, did not report in writing the condi-

tion of the estates, and that he did not exercise reasonable care, prudence and caution in his official capacity.

The jury rendered verdicts for the plaintiffs in each of said three cases, in the aggregate amount of $225,740.45 (Tr. 52, 383), the full amount claimed, and judgment was entered for the plaintiff in the full amount of said verdicts. (Tr. 56.)

The defendants appealed to the United States Circuit Court of Appeals for the Seventh Circuit, said appeal being argued before the Court on May 19, 1936, Judges Evans and Lindley sitting. (Tr. 391.)

Thereafter, said Court ordered a re-argument of said appeal, which was heard on November 18, 1936, by Circuit Judge Evans and District Judges Lindley and Briggle. (Tr. 392.) On January 8, 1937, Circuit Judge Evans filing a dissenting opinion, (Tr. 402), the Circuit Court of Appeals reversed the judgment of the District Court and remanded the case for a new trial, in accordance with directions contained in said opinion, said directions in substance being to direct a verdict for the respondents and not to submit to the jury the question of whether Howard was negligent in making deposits in a designated depository. (Tr. 393.) The plaintiffs thereupon petitioned the Court for a rehearing which was denied on January 29, 1937. (Tr. 406.)

REASONS FOR GRANTING THE WRIT.

I.

The Court below has decided an important question of general law in a way probably untenable or in conflict with the weight of authority by holding that, so long as he keeps the moneys of his estates in a designated depository, a trustee or receiver in bankruptcy may treat such moneys in reckless and knowing disregard of their safety, and may jeopardize them to obtain personal financial accommodations, without making himself or his surety liable upon his official bond for loss resulting therefrom.

II.

The Court below has decided an important question of Federal law which has not, but should be settled by this Court, the importance and the unsettled state thereof apparently having been recognized in part by this Court by its recent adoption of General Order in Bankruptcy LIII.

III.

The Court below has decided a Federal question in a way probably in conflict with applicable decisions of this Court, apparently as a result of confusing the obligations of a trustee or receiver in bankruptcy in respect of estate moneys, which are private funds, with the obligations of a public officer in respect of public funds.

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said Court to send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the orders of the Circuit Court of Appeals for the Seventh Judicial Circuit reversing said decree of the District Court be reversed and remanded; and that the petitioners be granted such other and further relief as may seem proper.

WALTER E. BEEBE,
Counsel for Petitioners.

GEORGE B. MCKIBBIN,
HAMILTON K. BEEBE,
CHARLES S. PRATT,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The judgments of the District Court appear in the record. (Tr. 56, 384.) No opinion was rendered by said Court.

The opinion of the Circuit Court of Appeals is reported in 87 F. (2d) 243. (Tr. 393.)

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A., Sec. 347-(a).)

The date of the decree of the Circuit Court of Appeals for the Seventh Circuit (Tr. 393) sought to be reviewed was January 8, 1937, and a rehearing was denied on January 29, 1937. (Tr. 406.)

III.

Statement of the Case.

The facts have been fully set forth under the caption "Statement of Matters Involved" which is hereby adopted.

IV.

Specifications of Error.

The Circuit Court of Appeals erred:

(a) In reversing the judgment of the District Court.

(b) In holding that loss resulting from the negligence of a trustee or receiver in bankruptcy in depositing or maintaining deposits of his estate moneys is not chargeable to his bondsman.

(c) In holding that the loss of estate moneys because of acceptance of personal favors by a trustee or receiver in bankruptcy in consideration of depositing and maintaining bankrupt funds in one depository, is not chargeable to his bondsman.

(d) In holding that a surety on a bond of a trustee or receiver in bankruptcy could not be charged for the loss of bankruptcy funds because of negligence in depositing and maintaining excessive amounts belonging to numerous estates in one designated depository when there was a choice available among a number of such depositories.

(e) In holding that under the provisions of the Bankruptcy Act, the bondsman could constitutionally be relieved by the Bankruptcy Act for negligence, resulting in the loss of bankruptcy funds, committed by a trustee or receiver in bankruptcy in depositing and maintaining of bankruptcy (private) funds in a designated depository.

SUMMARY OF ARGUMENT.

I.

The Circuit Court erred in setting aside the judgment in the District Court, based upon the verdict of the jury.

II.

A failure to exercise ordinary care in the performance of a statutory duty is a breach of a bond requiring that an official shall in all respects faithfully perform all his official duties as a trustee and the duties of his trust.

III.

The jury, under suitable instructions, found that Howard had breached his official bonds.

IV.

The public fund depository system (31 U. S. C. A. Sec. 476) and the plan provided in Section 47 of the Bankruptcy Act (11 U. S. C. A. Sec. 75) and Section 61 of the Bankruptcy Act (11 U. S. C. A. Sec. 101) have no relation to each other.

V.

No precedents can be obtained from the decisions, as to the liabilities of sureties upon official bonds for public funds under State statutes, which are of any benefit in the general consideration of the rules regarding liability for the loss of bankruptcy deposits in bankruptcy depositories.

VI.

Neither the Congress of the United States nor the State Legislatures can constitutionally relieve public officials or quasi-public officials of the United States or the States from the result of their negligence.

VII.

Howard violated each of the bonds that he gave as trustee and receiver, and his surety is liable for loss resulting from each of such violations.

ARGUMENT.

I.

The Circuit Court erred in setting aside the judgment in the District Court, based upon the verdict of the jury.

The majority of the Circuit Court of Appeals summed up its opinion as follows:

> "Howard's knowledge of the condition of the bank and his personal loans there, are to our mind facts immaterial in an action upon these bonds. They constitute no breach of the conditions. What their legal effect may be in an action against the Trustee personally, we are not called upon the to decide." (Tr. 402.)

The implication of the foregoing is that in selecting a depository and placing and maintaining bankruptcy funds therein, a trustee or receiver in bankruptcy may be guilty of a lack of every care or precaution which a reasonably cautious man would exercise in the care of his own funds, that he may ignore apparent dangers to the funds caused by the financial condition of the depository, runs thereon, loss of capital, bad management, or even the failing condition thereof. He may place bankruptcy funds therein because of personal favors or cause various depositories to bid for such funds by the promise of fees, favors, or for corrupt motives. He may, without regard to the strength of the depository, deposit therein bankruptcy funds many times the amount of the depository bond. Yet, if bankruptcy funds are lost by reason thereof, he cannot be guilty of actionable negligence in such a manner as to charge his bondsman. Such a suggestion is entirely new in the law of trusts, suretyship and bankruptcy.

In arriving at this conclusion, the Court ignored the fact that one of the duties of the Trustee or Receiver is "to deposit all money received," and that the place of deposit is only partially limited in that it must be "in one of the designated depositories." (11 U. S. C. A. 75 (a) (3).)

The majority of the Court below apparently made the error of assuming that there was no discretion vested in the Trustee or Receiver in the performance of his duty of depositing and maintaining deposits of moneys. The contrary is the fact. In Chicago, in August, 1930, when Howard made the original deposits in question, there were twenty-one different banks that were qualified as depositories for bankrupt funds. (Tr. 112, 113.) At all times thereafter while Howard had estate moneys in the Phillip State Bank and Trust Company (hereinafter called the "Phillip Bank"), there were a substantial number of such depositories. The duty of the Trustee or Receiver being only "to deposit" such funds in a designated depository, it follows that, in depositing the moneys received, he has the duty and discretion of selecting any one or more of the designated depositories. In placing all of the funds received in a single depository he could not ignore the relation of the size of the depository bond to the aggregate amount of money he placed or maintained in the depository, nor could he ignore the size or strength of the depository with relation to the amount of money deposited therein by him as such Trustee or Receiver, nor could he ignore information which he had relative to its solvency. These are ordinary duties of a trustee or receiver in making and maintaining deposits. These duties rested solely on him. Each time that Howard made a deposit for any bankrupt estate, and at all times while he maintained such deposits, he was subject to the test of ordinary care in a man depositing and

maintaining deposits of his own funds and being limited to banks that were designated depositories.

Howard voluntarily prejudiced his judgment as to the Phillip Bank in the following manner:

Within one month prior to July 15, 1930, one Beutel, who was an official of the Central Trust Company of Illinois, told Howard that he was about to become president of the Phillip Bank (Tr. 164) and requested Howard to make bankruptcy deposits therein. This discussion continued after said Beutel assumed his duties with the Phillip Bank and, as a result, Howard, who had been depositing his bankruptcy funds in the Central Trust Company of Illinois and the Foreman-State National Bank (Tr. 155), in consideration of transferring and depositing his bankruptcy funds in the Phillip Bank, obtained an agreement that the Phillip Bank would make to Howard, personally, unsecured loans of sufficient funds to pay his unsecured loans in the Foreman Bank and the Central Trust Company, and, in addition, would give him further unsecured loans. (Tr. 257-8.) Thus, three things are evident,—first, an agreement to give a favor to a trustee or receiver in bankruptcy was exacted by Howard for depositing and maintaining deposits in a particular bank after it became a designated depository; second, Howard considered it necessary to have an agreement that loans be made to him, before he felt free to take his bankruptcy funds out of one depository and place them in another; and, third, he felt unable to remove the bankruptcy funds from the Central Trust Company and the Foreman Bank until he was able to pay the personal unsecured loans which he had therein. (Tr. 203, 257.) Subsequent larger borrowings and more critical conditions in the Phillip Bank, where he thereafter made all of his deposits, would greatly accentuate

the mental limitations that he had at the time he transferred his bankruptcy funds thereto. (Tr. 77, 78, 203.)

The above-quoted statement of the majority of the Court, in summarizing its opinion, cannot be justified by any cases that have been decided anywhere, either in Federal or State Courts.

There is no time or circumstance in which a person, occupying an official position of trust, can be justified either in absolute negligence or in bad faith in performing an official duty, even though it merely may be the exercise of discretion in selecting between depositories.

Under the theory of the Circuit Court of Appeals, the designation of several depositories by the District Court, permits a trustee or receiver maliciously to seek out the depository most likely to fail and keep all of his estate moneys therein without any liability arising therefrom upon his official bond.

II.

A failure to exercise ordinary care in the performance of a statutory duty is a breach of a bond requiring that an official shall in all respects faithfully perform all his official duties as a trustee and the duties of his trust.

In the opinion of the majority of the Circuit Court of Appeals, there is an intimation that Howard, as trustee or receiver, might be liable for negligence in the performance of his duties in depositing or maintaining bankruptcy funds to his own credit in the Phillip Bank, without making his bondsman liable. (Tr. 402.) The most favorable assumption to Howard would be that a trustee or receiver in bankruptcy is in fact a public official. Then the rules having application would be the same as those applying to the lia-

bility on bonds of public officers, even though the funds managed by the trustee or receiver belonging to the bankrupt estates are in fact private funds. (*Florida Bank & Trust Co.* v. *Union Indemnity Co.*, 55 Fed. (2d) 640 (C. C. A.); *American Surety Company of New York* v. *Akron Savings Bank Company*, 74 Ohio St. 465, Aff. 212 U. S. 557, 53 L. Ed. 651), and are deposited in his own name (11 U. S. C. A. 75). The rule is clearly stated, with many authorities, in 22 R. C. L., page 496, Sec. 197, as follows:

> "The engagement of a surety executing such a bond rests on the same legal obligation as is by law imposed on the public officer himself. Whatever is a breach of the conditions of the bond as regards the principal is equally so as to the sureties, * * *." (Many authorities cited.)

In his dissenting opinion, Judge Evans stated:

> "In other words, a trustee is one who occupies a fiduciary relation towards the creditors of the bankrupt. His is a position of trust. When the trustee, Howard, arranged with the bank to get a personal loan for a substantial sum and in return agreed to deposit the moneys which belonged to the creditors of the various estates for which he was trustee in the bank that loaned him personally the money, he failed in his plain duty to the creditors. He could not avoid the consequences of that failure if loss resulted through a failure of the bank, by showing that the bank wherein the money was deposited was a bank of deposit." (Tr. 403.)

Thus, even though the rule applicable to public officials were applied, the liability of Howard and his bondsman would not be relieved.

The majority opinion cites certain cases with reference to the necessity of placing bankrupt funds in designated depositories, and the courts emphasize this requirement. We have, however, found no case which indicates that a

trustee or receiver in bankruptcy may ignore his knowledge of dangerous conditions when selecting one depository from among many; or that he may limit his freedom of action as trustee or receiver by placing himself under personal obligation. We submit that where the statute requires an official to place funds with which he is entrusted in a fiduciary capacity in a certain class of depository, and he has the right to select between several depositories within such class, the very selection is in itself a fundamental and necessary discretionary duty, in the exercise of which he is liable for negligence.

The general rule goes beyond the statements above made. Where a bond is given to secure moneys to be deposited in a designated depository, if the officer having charge of making the deposits places larger sums in the depository than the amount of the depository bond, under the apparent protection of such bond, such officer and his bondsman are ordinarily liable as insurers for any excess beyond the amount of the depository bond. (*State* v. *U. S. Fidelity & Guar. Co.,* 210 Wis. 178, 246 N. W. 434, 436; *Roberts County* v. *Wickard,* 53 S. D. 511, 221 N. W. 246; *State* v. *Carney,* 208 Ia. 133, 217 N. W. 472; *Mass. Bonding & Ins. Co.* v. *Steele,* 125 Neb. 7, 248 N. W. 648.) In other words, the protection that is given is co-extensive with the penalty of the bond.

The rule of the jurisdiction as to liability for the faithful performance of the duties of the depositing officer applies. If the money, when deposited, is in the name of the depositing officer the insurance rule ordinarily applies and the officer and his bondsman are liable for losses beyond the amount of the depository bond. If the money becomes the property of the State and the depository holds the money as the money of the State there may be no liability or there may be a divided responsibility depend-

ing upon circumstances or statutory rule. Bankruptcy funds are private and held by the trustee or receiver in a fiduciary capacity and, accordingly, he is held to strict liability for negligence in the management of such funds. (*In re Singer Furniture Corporation,* 47 Fed. (2d) 780, 784.)

This case was tried on the theory that Howard's duty was that of exercising ordinary care as a trustee or receiver in depositing and maintaining bankruptcy funds. There are no cases that we have been able to find, nor have any been pointed out, which relieve an official and his bondsman from liability for negligence in the management of private funds committed to his care.

III.

The jury, under suitable instructions, found that Howard had breached his official bonds.

The official bonds of Howard provided that he should obey such orders as the Court might make with relation to the trust; should faithfully and truly account for all the moneys, assets and effects of the estate of each of said bankrupts which should come into his hands and possession; and that he should, in all respects, faithfully perform all his official duties as trustee or receiver.

a. Howard failed to obey the orders of the Court:

Evidence was introduced that Judge Carpenter, on July 1, 1931, entered an order requiring *receivers* to report to the Court the amount of funds in all depositories. (Tr. 145.) No such report by Howard from June 9, 1931, until after June 21, 1932, was found, although secondary evidence was given to indicate that something had been taken to the clerk's office from time to time. (Tr. 145,

153, 159, 184, 185, 187, 188, 204, 252, 277.) The jury was entirely justified in believing that Howard had not made any such report of the amount on deposit in the bank, save to a deputy clerk, on June 9, 1931, and none pursuant to the Court's order. Hence, if the order of July 1, 1931, by Judge Carpenter was the character of an order contemplated in the statutory duties of Howard, there was no primary evidence that he ever made a report of the funds in all of his bankrupt estates during the entire time that the funds were in the Phillip Bank.

b. Howard failed to account:

It may well be that the jury also believed that Howard had violated the provision of the bond requiring him to "faithfully and truly account for all the moneys, assets, and effects of the estate * * * which shall come into his hands and possession, * * *."

In 1 C. J. S. 576, the author states:

> "The verb 'account' is frequently employed with 'for,' and the term 'account for,' has, in various adjudications, been interpreted to mean paying over the money to the person entitled thereto; hence more than merely filing an exhibit or statement of account." (Citing authorities.)

The question of the duty of a fiduciary is considered under such an expression in the bond in *Hale County, Texas* v. *American Indemnity Co.*, 63 Fed. (2d) 275, on page 279. (C. C. A.)

It was within the contemplation of each of the bonds that, both as to receiver and trustee, moneys would come into Howard's hands and be accounted for. It was not accounting for money to place and keep it in a depository known to be on the verge of failure or, in handling the funds which came into his hands, to limit his power to act by taking special favors.

Also, there was an unconscionable amount of money continually kept on deposit and Howard had the primary duty of distributing such money. Howard had $416,833.90 of estate moneys on deposit in the Phillip Bank, when it closed. (Tr. 72.) For example, $132,707 went on deposit on August 25, 1930, to the credit of the National Theatre Corporation (Tr. 73), and $52,174.17 still was on deposit to the credit of such account at the time the bank closed, with only a $1,000 bond. (Tr. 24.) Because of the delay in payments, if for no other reason, and the final loss because of such delay, there was not a faithful accounting. A delay in payment of dividends may be a breach of duty to account. (Reference is made to Judge Evans' dissenting opinion herein. Tr. 403.)

c. Howard failed to perform his official duties:

There is a breach of the third provision of the bond requiring Howard, as trustee or receiver, "to faithfully perform all his official duties as such trustee." The occasion for requiring a depository bond is protection of the funds of bankrupt estates which are on deposit. (Gilbert's Collier on Bankruptcy, 2d Ed., Sec. 101 (b), page 929.) The bond required by statute was intended to protect the deposits. The condition of the bond of a trustee or receiver in bankruptcy is breached by the negligence, without corruption, of the principal in the performance of even a ministerial duty. (*U. S.* v. *Perkins,* 280 Fed. 546 (C. C. A.); *In re Hoyt, et al.,* 119 Fed. 987.) As is pointed out by Judge Evans, and as is shown in each bond, Howard occupied a trust or a fiduciary relationship. (Tr. 60, 65, 403.) (25 C. J., page 1118.)

It is a general rule that where, by statute, an official is required to deposit in a particular depository, this does not relieve such official from liability for malfeasance,

misfeasance or nonfeasance in the care of funds. (*Jordon* v. *Baker*, 252 Ky. 40, 66 S. W. (2d) 84, 93 A. L. R. 813; *Edwards* v. *Logan County*, 244 Ky. 296, 50 S. W. (2d) 83; *State* v. *McNamer*, 62 Mont. 490, 205 Pac. 951.) A public or quasi-public officer is liable for misconduct in the performance of his duties. (46 C. J., Sec. 398, page 1068, and Sec. 401, page 1069.) In fiduciary relationships involving trusts, a trustee or fiduciary may not place himself in a position in which his self interest will or may conflict with his duty as trustee. (65 C. J. 520, page 652; *Booth* v. *Greer Investment Co.*, 52 Fed. (2d) 857, 860 (D. C. Okla.); *Bennett* v. *Weber*, 323 Ill. 283, 294, 154 N. E. 105, 109.) Furthermore, a trustee or receiver must act in good faith and with ordinary prudence in making and maintaining deposits in a bank, otherwise he is liable for a loss occasioned by the failure of such bank. (53 C. J., Sec. 194, page 156; 65 C. J., Sec. 566, page 701, and Sec. 519, page 647; see, also, *Fidelity & Deposit Co.* v. *Redfield*, 7 Fed. (2d) 800 (C. C. A. 9th C.).

It will be observed that these principles apply to making and maintaining deposits, to the several runs on the Phillip Bank, to the reduction in the deposits, and to the various notices which came to Howard, from the officers of the bank (Tr. 169-178, 192-196, 259-263), from publications (Tr. 83-101, 271) and other sources. (Tr. 117-118, 120, 123-128.) Notice of facts which would put a man of ordinary prudence on inquiry under similar circumstances, will be construed as notice of all the facts which a reasonably diligent inquiry would disclose. This is a basic rule of the law of trusts and applies equally to the handling of bankruptcy funds by a trustee or receiver in bankruptcy. (46 C. J., Sec. 28, page 543; *Essex National Bank* v. *Hurley*, 16 Fed. (2d) 427 (C. C. A. 1st C.);

Grandison v. *National Bank of Commerce*, 231 Fed. 800, 809 (C. C. A. 2d C.); *Martin* v. *Federal Surety Co.*, 58 Fed. (2d) 79 (C. C. A. 8th C.); *Coder* v. *McPherson*, 152 Fed. 951 (C. C. A. 8th C.); *McClean* v. *Bradley*, 282 Fed. 1011, Aff. 299 Fed. 379 (C. C. A. 6th C.), Cert. Den. 266 U. S. 619, 69 L. Ed. 471.)

Under the facts in this case the jury might well have been peremptorily instructed to find for the plaintiffs. The violations of duties, above set forth, were all admitted with the exception of the failure to make reports of total deposits. Both as to the violations of the second and third provisions of the bonds, the facts which are stated were not denied. In fact, they were testified to by Howard and the officers of the Phillip Bank who testified in his behalf. (Tr. 162, 191.) The instructions to the jury (Tr. 297-300) were based on the duty of Howard, as trustee and receiver, to use the degree of care which would guide a reasonably prudent man in the conduct of his trust responsibilities. The jury, on a consideration of the foregoing facts, found that Howard had breached his bonds, and that he and his bondsman were liable.

IV.

The public fund depository system (31 U. S. C. A. Sec. 476) and the plan provided in Section 47 of the Bankruptcy Act (11 U. S. C. A. Sec. 75) and Section 61 of the Bankruptcy Act (11 U. S. C. A. Sec. 101) have no relation to each other.

Moneys paid to public officers are ordinarily funds of the United States and belong to the United States in the hands of the depositories. Moneys in the hands of receivers in bankruptcy are private funds belonging to pri-

vate individuals and trustees have the title to bankrupt funds as private funds. Such funds are placed in the depository in the names of the receivers or trustees and they have dominion and control over such funds, except as to certain formalities.

The general rule is that where Federal moneys, or moneys under the control of the Federal Government or its officers, are concerned, such officers and their bondsmen are held to a strict accountability, except in so far as they are relieved by statute. We have called the Court's attention to the fact that an obligation of the surety upon the bond and the duty of a public official are co-extensive, and that whatever is a breach of the conditions of the bond, as regards the principal, is equally so as to the surety. (Page 19, *supra.*) (22 R. C. L., page 496, Secs. 176, 189; see, also, Perm. Supp. and 1936 Supp. under the same sections.) This is true whether the bond is voluntary or required by statute. (Same volume, Sec. 178.) It is equally true if a tort is committed while the officer is acting within the scope of his authority, and it is now generally held that it is immaterial whether the act is done by virtue of the office or under color of office. (22 R. C. L., Sec. 190, page 507, note 2; also 46 C. J., page 1069, Sec. 401.)

Therefore, if the rules which apply to bonds of public officials may be considered in this case, either there is no liability upon the Trustee or Receiver for any act which he may commit, no matter how negligent, wilful or deliberate, or else the bondsman is liable for any loss resulting from any such act.

The question of liability on bonds of public officials for the protection of public funds is discussed most elaboratory in a note in 93 A. L. R. on page 819, where the author states:

> "Upon the general question there exists an irreconcilable conflict of opinion. The weight of authority, numerically at least, adheres to a doctrine of strict liability, holding that such an officer is not to be exonerated by any consideration of honesty, diligence, and faithfulness in the case of the loss of public money while in his hands, unless the loss shall have been occasioned by the act of God or the public enemy."

The respondents cited a great number of cases in the lower court, the major number of them cited in this particular authority, and the majority of the Court below has cited a number of them in its opinion. We respectfully submit that we have refrained from considering them at length because they would merely show a great contrariety of opinion and different practices in different States, and would be of no real benefit in this discussion.

The receiver or trustee in bankruptcy deals with private funds which are deposited in his own name and which he primarily controls. In the instant case, the jury found that in depositing and maintaining such private funds in his fiduciary capacity Howard breached his bonds. This question as related to the facts of this case never has been adjudicated in a court of record, but by every rule of reason, common sense and common honesty, and by analogy with appropriate decisions, the surety on Howard's official bonds is liable for his gross negligence.

V.

No precedents can be obtained from the decisions, as to the liabilities of sureties upon official bonds for public funds under State statutes, which are of any benefit in the general consideration of the rules regarding liability for the loss of bankruptcy deposits in bankruptcy depositories.

It may be stated that, following the early Federal rules, the greater number of States follow the doctrine that public officers holding title to public money are the insurers of the funds in their possession, particularly if the title to such funds remains in the person making the deposit.

U. S. v. *Thomas,* 15 Wall. 337, 21 L. Ed. 89.
Boyden v. *U. S.,* 13 Wall. 17, 20 L. Ed. 527.
Wiley v. *Sparta,* 154 Ga. 1, 114 S. E. 45, 25 A. L. R. 1342.

In a few States the courts have adopted the bailee rule where they have felt that the insurance rule is too severe, and in such States the rule is that where the depositing officer fails to exercise ordinary care or is guilty of negligence, he and his bondsman are liable for a loss of funds. In still other States, the legislatures have made the depositories themselves public officials and the money in their hands becomes public funds and the officer making the deposit thereby is relieved from all liability because he has no title to such funds. There are some variations of these rules not necessary in this discussion.

In *Hamden* v. *American Surety Co.,* 9 Fed. Supp. 733, the Court considered the general theories of liability upon surety bonds, in dealing with the question of the

liability of the treasurer of a town in Connecticut. It referred to the original insurance rule of liability for loss of public funds by Federal officials and to the subsequent modifications as to the deposits of public funds from a Federal standpoint, (31 U. S. C. A., Sec. 521, and 12 U. S. C. A., Secs. 391, 392), which permitted the secretary of the treasury to designate any of the Federal Reserve Banks as the depositories or fiscal agents of the United States and pointed out that, in effect, Federal funds, when deposited in such Federal Reserve Banks, are in the treasury of the United States. The Court later said, in reference to bonds given to secure Federal funds, page 738:

> "The policy of these statutes and the unqualified undertakings of official bonds given in conformity therewith, the Supreme Court has indeed declined to relax."

However, in considering the question of bonds given to secure State officials, the Court said:

> "Indeed, the liability of a state official, as well as the construction of his official bond, is a matter of local law as distinguished from one of general jurisprudence. *Bassinger* v. *U. S. Fidelity & Guaranty Co.* (C. C. A.) 58 F. (2d) 573, certiorari denied 287 U. S. 622, 53 S. Ct. 21, 77 L. Ed. 540. Necessarily the liability of such an official will depend on state statutes, if such exist; and in the absence of statute, on the common law of the state which in large measure must be deduced from the administrative system of the state."

The note in 93 A. L. R. on page 819, previously referred to, accentuates the fact that until this Court has passed upon the rules in this particular situation, the most direct authorities are those cases which consider the negligent management of trust funds, primarily those having to

do with deposits in banks. Neither the majority of the Circuit Court nor counsel for Respondents have considered the fact that beyond the amount of the depository bonds there is no protection to the bankruptcy deposits, save the size and strength of the bank in which the money is deposited.

The whole history of surety bonds, in so far as the Federal Government is concerned, shows an adherence to the doctrine of strict liability. The District Court applied the liberal bailee theory in instructing the jury, in spite of the action of Howard in limiting his power of selection between depositories by accepting personal favors. Because of the application of this rule, the instructions were less stringent than they properly might have been under the law and facts of the case.

VI.

Neither the Congress of the United States nor the State Legislatures can constitutionally relieve public officials or quasi-public officials of the United States or the States from the result of their negligence.

There is some possible basis for the State or Federal Government, if it should see fit to do so, to grant relief from the rigorous rule of insurance by public officials and their bondsmen in times of great stress and where no negligence has occurred in the management of such funds. However, there is no condition where the State or Federal Government has released a public officer or his bondsman from liability for loss resulting from direct negligence in the deposit of public funds when he has any power of selection between depositories.

In an extensive note in 38 A. L. R., referring to the

loss of public funds, the author, citing many cases, said, page 1513: -

> "A majority of the courts hold that an act of the legislature designed to relieve a public officer or his surety from liability for the loss of public funds, *occurring without the fault of the officer,* is constitutional; * * *." (Italics ours.)

This power to relieve the officer applies only to *public* funds and only when the public officer was not at fault. In the instant case *private* funds were involved and the fault of the officer, Howard, was shown.

To deny the right to recover for the negligence of the trustee or receiver herein would be a deprival of property without due process of law in violation of the 5th amendment to the Constitution of the United States.

In 2 Cooley on Const. Lim., it is said on page 758 (8th Ed.):

> "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away."

In *Angle* v. *Chicago, St. P. M. & O. R. Co.,* 151 U. S. 1, 38 L. Ed. 55, it is said on page 65:

> "An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."

Muir v. *L. & N. Ry. Co.,* 247 Fed. 888, 897.

12 C. J., Sec. 551, page 972.

Black, Const. Law, 3rd Ed., page 602.

VII.

Howard violated each of the bonds that he gave as trustee and receiver, and his surety is liable for loss resulting from each of such violations.

To summarize—prior to the time that Howard made any deposits in the Phillip Bank, he discussed transferring deposits which he had in certain large Chicago depositories, to the Phillip Bank, a small outlying depository. He had unsecured loans in such depositories and did not feel that he could transfer such deposits unless he obtained money to pay off the loans which he had therein. He came to an agreement with the executive officers of the Phillip Bank that they would loan him money to pay off his personal unsecured loans at other banks if he would transfer his bankruptcy funds to the Phillip Bank when it became a qualified depository. On August 20, 1930, said bank qualified as a depository, and before the end of that month $249,533.32 was deposited against its $50,000 depository bond. Said bank then had $3,401,014.29 of total deposits. Such excessive deposits were evidence of questionable faith in the performance of Howard's duties as trustee or receiver. As a condition of making such deposits there was a further agreement that Howard should be given such additional loans as he required. Prior to the time of making any deposits therein, Howard received $11,000 from the Phillip Bank which was more than enough to pay off his aforesaid personal loans. Subsequently, his unsecured borrowings therefrom increased to $18,515, of which $17,500 was not repaid at the time said bank failed on June 21, 1932. He was told by the officers of the Phillip Bank of runs in April, June, September and December of

1931. Howard knew that the result of each of said runs and particularly the cumulative effect thereof was to impair, if not destroy, the possibility of withdrawing the large demand deposits of his estates.

The evidence is replete with the talks that Howard had with the bankers and assurances that another bank was backing the Phillip Bank. (Tr. 199, 261, 262.) Any reasonable man, depositing his own funds in a bank, would not be so unwise as to depend on assurances of protection by another bank which was under no legal responsibility to protect his funds. The reason for Howard failing to withdraw his funds is plain. If Howard had attempted to remove any substantial portion of his bankruptcy funds from the Phillip Bank, the probability was that he would be called upon to pay off his personal loans and if he could not do that he would be destroyed financially as he "was not a man of any means." (Tr. 257.) If, on the other hand, he left the bankruptcy funds in the bank, there was a slight possibility that the bank might stay open. He took that chance with the bankruptcy funds in the attempt to save himself, with the resultant loss to the creditors of the various estates.

Under the Bankruptcy Act, Howard had no duty as a trustee or receiver for hire, to advance funds to the estates or in any way to commingle his personal affairs with those of the trusts. The fact that he advanced funds did not excuse his having accepted favors from the bank and thus placing himself in a position where it was necessary for him to make his fiduciary obligation subservient to his personal interests.

Much was said in the opinion of the Circuit Court about other banks and other trustees. The method of operating bankruptcy and receivership estates by other trustees and receivers is not here involved.

Howard is liable because of negligence in the conduct of his estates and his surety is equally liable.

The Court has recently recognized some of the difficulties that have arisen in connection with bankruptcy funds that are placed in designated depositories and has adopted an order safeguarding the depository bonds. (General Order LIII.) This order and these safeguards do not meet the present situation as here the depository bond was paid and the loss is for deposits in excess thereof. If the decision of the Circuit Court is permitted to remain law, there is no safeguard against depositories bidding against each other by the promise of personal favors to a trustee or receiver, nor any safeguard against negligence on the part of a trustee or receiver in depositing or maintaining bankruptcy funds.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 30

UNITED STATES OF AMERICA, on relation of Chester A. Willoughby, as Trustee in Bankruptcy of National Mechanical Service Company, a corporation, et al,

Petitioners,

vs.

SAM HOWARD and CONTINENTAL CASUALTY COMPANY, a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Principal Question Presented	4
Statement	5
Specification of Errors to be Urged	11
Summary of Argument	13
Argument	15
I. The Circuit Court erred in setting aside the judgment of the District Court based upon the verdict of the jury	15
II. Howard violated each of his official bonds	18
A. Howard failed to obey the orders of the Court	18
B. Howard failed to account	19
C. Howard failed to perform his official duties	20
III. The liability of his surety is coextensive with that of the Trustee or Receiver in Bankruptcy in respect of all losses resulting from official acts or omissions of such Trustee or Receiver	22
A. The surety company's liability	22
B. The opinion of the Circuit Court	23
C. The Federal rule as to the liability of sureties on official bonds	29

PAGE

IV. Negligence, or a failure to exercise ordinary care in the performance of a statutory duty, entering into corrupt agreements, accepting personal favors, or accepting compensation other than as allowed by law are violations of the official bond of a Trustee or Receiver in Bankruptcy 34

V. The public fund depository system (31 U. S. C. A., Sec. 476) and the plan provided in Section 47 of the Bankruptcy Act (11 U. S. C. A., Sec. 75) and Section 61 of the Bankruptcy Act (11 U. S. C. A., Sec. 101) have no direct relationship to each other..... 39

VI. Neither the federal nor state cases are in conflict with the verdict of the jury or the judgment of the trial court as to the liability of Howard and his surety..... 40

VII. Neither the Congress of the United States *nor the State Legislatures* can constitutionally relieve public officials or quasi-public officials of the United States or the States from liability from the results of their negligence 42

VIII. The record discloses no error in the trial which is prejudicial to the defendants, or either of them..... 44

Conclusion 50

Citations.

CASES:

	PAGE
American Surety Company of New York v. Akron Savings Bank Company, 74 Ohio St. 465, Aff. 212 U. S. 557, 53 L. ed. 651	34
Amer. Surety Co. v. Public Schools, 70 F. (2d) 653	20
Anderson v. Peterson State Bank, 191 Minn. 404, 408, 254 N. W. 459, 461	37
Angle v. Chicago, St. P. M. & O. R. Co., 151 U. S. 1, 38 L. ed. 55	44
Bennett v. Weber, 323 Ill. 283, 294, 154 N. E. 105, 109	21
Bevans, Receiver v. United States, 13 Wall. 56, 20 L. ed. 531	30
Board of Comrs. of Grant Co. v. Soucek, 128 Okla. 151, 261 Pac. 947, 949	37
Booth v. Greer Investment Co., 52 F. (2d) 857, 860	21
Boyden v. United States, 13 Wall. 17, 20 L. ed. 527	30
California Ins. Co. v. Union Compress Co., 133 U. S. 387, 33 L. ed. 730	46
Camp v. Gress, 250 U. S. 308, 63 L. ed. 997, 1004	48
Campbell v. American Bonding Company, 172 Ala. 458, 55 So. 306	25
Central Vermont Railway Co. v. White, 238 U. S. 507, 59 L. ed. 1433	45
Chambers v. Farnham, 236 F. 886	49
Cheyenne v. Maryland Casualty Co., 13 F. (2d) 401	37
City of Billings v. Mass. Bonding & Insurance Co., 88 Mont. 91, 290 Pac. 246	28
City of Parsons v. Fidelity & Deposit Co., 29 F. (2d) 417, case reversed, 43 F. (2d) 315	26
City of Salisbury v. Lyerly, 208 N. C. 386, 180 S. E. 701	25
Cloquet Lumber Co. v. Burns, 222 F. 857	49
Coder v. McPherson, 152 F. 951	22
Cudahy Packing Co. v. Narzisenfeld, 3 F. (2d) 567, 572	48

PAGE

District of Columbia v. Petty, 229 U. S. 593, 57 L. ed. 1343 25
Edwards v. Logan County, 244 Ky. 296, 50 S. W. (2d) 83 21
Essex National Bank v. Hurley, 16 F. (2d) 427 22
Fidelity & Casualty Co. v. Glenn, 3 F. (2d) 913, 918 48
Fidelity & Deposit Co. v. Redfield, 7 F. (2d) 800 21
Florida Bank and Trust Company v. Union Indemnity Co., 55 F. (2d) 640 34
Frank v. Salm, 75 F. (2d) 747, 748 35
Grandison v. National Bank of Commerce, 231 F. 800, 809 22
Graves v. U. S., 150 U. S. 118, 37 L. ed. 1021 49
Hale County, Texas v. American Indemnity Co., 63 F. (2d) 275 19
Horning v. District of Columbia, 254 U. S. 135, 65 L. ed. 185 47
Howard v. U. S., 87 F. (2d) 243 ..... 1, 15, 20, 24, 27, 31, 35
In re Hoyt, et al., 119 F. 987 21
Huttig Mfg. Co. v. Edwards, 160 F. 619 32
Illinois Surety Company v. U. S., 226 F. 665 28
Jordon v. Baker, 252 Ky. 40, 66 S. W. (2d) 84, 93 A. L. R. 813 21
Knass v. Madison and Kedzie Bank, 354 Ill. 554, 566, 567, 188 N. E. 836, Appeal Dismissed 292 U. S. 599, 78 L. ed. 1463 49
Lamb v. Townshend, 71 F. (2d) 590, 592 35
In re Lenters, 225 F. 878, 883 21
Local 167, I. B. T. etc. v. United States, 291 U. S. 293, 296, 78 L. ed. 804, 808 45
Lovejoy v. U. S., 128 U. S. 171, 32 L. ed. 389 46
Lowe v. City of Guthrie, 4 Okla. 287, 44 Pac. 198 ..... 24, 25
Magruder v. Drury, 235 U. S. 106, 59 L. ed. 151 37
Martin v. Federal Surety Co., 58 F. (2d) 79 22
Mass. Bonding & Ins. Co. v. Steele, 125 Neb. 7, 248 N. W. 648 37

PAGE

McClean v. Bradley, 282, F. 1011, Aff. 299 F. 379, Cert. Den. 266 U. S. 619, 69 L. ed. 471 22

McCreary v. Schenebeck, 191 Ark. 698, 87 S. W. (2d) 572, 574 49

Michoud v. Girod, 4 How. 503, 11 L. ed. 1076 37

Missouri Dist. Telegraph Co. v. Morris & Co., 243 F. 481, Cert. Den. 245 U. S. 651, 62 L. ed. 531 49

Monument Pottery Co. v. Imperial Coal Corporation, 21 F. (2d) 683, 685 48

Muir v. L. & N. Ry. Co., 247 F. 888, 897 44

National Bank of Redemption v. Rutledge, 84 F. 400 23

Natl. Surety Co. v. State, 152 Md. 71, 136 Atl. 274 .. 21

Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286 46

Orton v. City of Lincoln, 156 Ill. 499, 41 N. E. 159 25

Parks v. Turner, et al., 12 How. 39 (53 U. S.) 13 L. ed. 883 48

Philips, etc. Construction Co. v. Seymour, 91 U. S. 646, 648, 23 L. ed. 341 45

Portland Gold Mining Co. v. Flaherty, 111 F. 312, 319 48

Rice v. Bakovic, 53 F. (2d) 890 48

Roberts County v. Wickard, 53 S. D. 511, 221 N. W. 246 36

Rodgers v. Bankers Nat. Bank, 179 Minn. 197, 229 N. W. 90, 91 21

Rucker v. Wheeler, 127 U. S. 85, 32 L. ed. 102, 106 46

St. Louis & S. F. R. Co. v. Duke, 192 F. 306, 309 .. 48

Schenebeck v. McCrary, et al., 298 U. S. 36, 80 L. ed. 1031 43

In re Singer Furniture Corporation, 47 F. (2d) 780, 784 35

Slope County v. Douglas, 49 N. D. 1026, 194 N. W. 385 20

Smythe v. United States, 188 U. S. 156, 47 L. ed. 425 31

South Memphis Land Co. v. McLean Hardwood Lumber Co., 210 F. 257, 260 48

PAGE

State v. Bobleter, 83 Minn. 479, 86 N. W. 461.... 27
State v. Carney, 208 Ia. 133, 217 N. W. 472..... 37
State v. McNamer, 62 Mont. 490, 205 Pac. 951.....20, 21
State v. U. S. Fidelity & Guar. Co., 210 Wis. 178, 246 N. W. 434, 436..... 36
Thompson v. Hays, 11 F. (2d) 244..... 21
Thompson v. Riggs, 5 Wall. (72 U. S.) 663, 18 L. ed. 704, 708..... 48
Toland v. Sprague, 12 Pet. 300, 9 L. ed. 1093..... 48
Town of Hamden v. American Surety Company, 9 F. Supp. 733.....29, 31, 39, 40, 41
Union Pac. R. Co. v. Field, 137 F. 14, 17..... 49
United States v. Dashiell, 4 Wall. 182, 18 L. ed. 319, 321..... 30
United States v. Keehler, 9 Wall. 83, 19 L. ed. 574.. 30
United States v. Morgan, 11 How. 154, 13 L. ed. 643 30
United States v. Perkins, 280 F. 546.....20, 26
United States v. Prescott, 3 How. 578, 11 L. ed. 734, 738..... 30
U. S. v. Rehwald, et al., 44 F. (2d) 663..... 19
United States v. Thomas, 15 Wall. 337, 21 L. ed. 89.....30, 33
U. S. Coal Co. v. Pinkerton, 169 F. 536..... 49
Vermilye v. Adams Express Co., 21 Wall. (88 U. S.) 138, 22 L. ed. 609, 612..... 48
Vicksburg and Meridian Railroad Company v. Putnam, 118 U. S. 545, 30 L. ed. 257, 258..... 46
Waldron v. Waldron, 156 U. S. 361, 39 L. ed. 453.. 49
Wilkes Barre v. Rockafellow, 171 Pa. 177, 33 Atl. 269, 270..... 26

TEXTS:

	PAGE
38 American Law Reports 1513 (note)	42, 43
93 American Law Reports 819 (note)	40, 41
Black, Const. Law, 3rd Ed., page 602	44
Black's Law Dictionary, 2nd Ed.	35
Bouvier's Law Dictionary	36
2 Cooley on Const. Lim. (8th Ed.) page 756	43
11 Corpus Juris, page 1225, note 13	24
12 Corpus Juris, Sec. 551, page 972	44
22 Corpus Juris, Sec. 370, page 330, and Sec. 505, pages 421, 422	49
25 Corpus Juris, page 1118	21
46 Corpus Juris, Sec. 28, page 543	22
46 Corpus Juris, Sec. 398, page 1068	23
46 Corpus Juris, Sec. 398, page 1068, and Sec. 401, page 1069	21
46 Corpus Juris, Sec. 401, page 1069	24
53 Corpus Juris, Sec. 194, page 156	21
65 Corpus Juris, Sec. 520, page 652	21, 39
65 Corpus Juris, Sec. 566, page 701, and Sec. 519, page 647	21
67 Corpus Juris, page 255	24
1 Corpus Juris Secondum 576	19
4 Cyc. of Fed. Proc., Sec. 1463, page 1022	48
Gilbert's Collier on Bankruptcy, 2d Ed., Sec. 101 (b), page 929	20
14 Ruling Case Law, Sec. 15, page 743	46
22 Ruling Case Law, Sec. 190, page 507, note 2	24

STATUTES: PAGE

Smith-Hurd Ann. St., Ill., Chap. 38, Sec. 64, and Chap. 16½, Sec. 9 49
Title 11 U. S. C. A., Sec. 53, Form XXV, Bankruptcy Act, Sec. 30 32
Title 11 U. S. C. A., Sec. 75, Bankruptcy Act, Sec. 47 ..... 2, 13, 39
Title 11 U. S. C. A., Sec. 75 (a) (2) 20
Title 11 U. S. C. A., Sec. 75 (a) (3) 16, 25
Title 11 U. S. C. A., Sec. 75 (a) (3) 35
Title 11 U. S. C. A., Sec. 78 (b) 32
Title 11 U. S. C. A., Sec. 101 Bankruptcy Act, Sec. 61 ..... 3, 13, 32, 39
Title 11 U. S. C. A., Sec. 110, Bankruptcy Act, Sec. 70 ..... 3, 33, 35
Title 12 U. S. C. A., Sec. 391—Banks and Banking .. 4, 31
Title 12 U. S. C. A., Sec. 392—Banks and Banking .. 4, 31
Title 28 U. S. C. A., Sec. 347 (a) 2
Title 28 U. S. C. A., Sec. 391 48
Title 28 U. S. C. A., Sec. 391, page 443, note 203, and page 416, note 121 47
Title 31 U. S. C. A., Sec. 476 ..... 3, 13, 31, 39

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Petitioners,

vs.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The judgments of the District Court appear in the record. (R. 56, 384.) No opinion was rendered by said Court.

The opinion of the Circuit Court of Appeals is reported in 87 F. (2d) 243. (R. 393.)

JURISDICTION.

The date of the decree of the Circuit Court of Appeals for the Seventh Circuit (R. 393) sought to be reviewed was January 8, 1937, and a rehearing was denied on January 29, 1937. (R. 406.)

The petition for a writ of certiorari was filed April 20, 1937, and was granted May 24, 1937.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A., Sec. 347 (a).)

STATUTES INVOLVED.

Section 47 Bankruptcy Act, 11 U. S. C. A. 75:

"(a) Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them on property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; * * * (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; * * * (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; * * * (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; * * *."

Section 61 Bankruptcy Act, 11 U. S. C. A. 101:

"*Depositories for money.* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories. (July 1, 1898, c. 541, sec. 61, 30 Stat. 562.)"

Section 70 Bankruptcy Act, 11 U. S. C. A. 110:

"(a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, * * *."

Title 31 U. S. C. A.—Money and Finance—Sec. 476:

"*Transfer of duties of assistant treasurers to other officers, etc.* The Secretary of the Treasury may, in his discretion, transfer any or all of the duties and functions performed or authorized to be performed prior to May 29, 1920, by assistant treasurers at Boston, New York, Philadelphia, Baltimore, New Orleans, Saint Louis, San Francisco, Cincinnati, and Chicago, or their offices, to the Treasurer of the United States or the mints or assay offices of the United States, under such rules and regulations as he may prescribe, or may utilize any of the Federal reserve banks acting as depositaries or fiscal agents of the United States, for the purpose of performing any or all of such duties and functions, notwithstanding the limitations of sections 391 and 392 of Title 12, or any other provisions of law. (May 29, 1920, c. 214, Sec. 1, 41 Stat. 655.)"

Title 12 U. S. C. A.—Banks and Banking—Sec. 391:

"Federal reserve banks as Government depositaries and fiscal agents

"The moneys held in the general fund of the Treasury, except the 5 per centum fund for the redemption of outstanding national-bank notes and the funds provided in this chapter for the redemption of Federal reserve notes may, upon the direction of the Secretary of the Treasury, be deposited in Federal reserve banks, which banks, when required by the Secretary of the Treasury, shall act as fiscal agents of the United States; and the revenues of the Government or any part thereof may be deposited in such banks, and disbursements may be made by checks drawn against such deposits. (Dec. 23, 1913, c. 6, sec. 15, 38 Stat. 265.)"

Title 12 U. S. C. A.—Banks and Banking—Sec. 392:

"Depositaries of Government funds as confined to banks in Federal reserve system; member banks as depositaries

"No public funds of the Philippine Islands, or of the postal savings, or any Government funds, shall be deposited in the continental United States in any bank not belonging to the system established by this chapter: *Provided, however,* That nothing in this chapter shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositories. (Dec. 23, 1913, c. 6, Sec. 15, 38 Stat. 265.)"

PRINCIPAL QUESTION PRESENTED.

Does the fact that a trustee or receiver in bankruptcy deposits and maintains the funds of his estates in one of several designated depositories relieve him and his surety from liability upon his official bonds, which are conditioned upon the faithful performance of his duties, for loss of estate funds occasioned by the failure of the particular depository in which he chooses to keep

such funds when such depository was selected and the estate funds were deposited and maintained therein negligently or in disregard of the known financial weakness of such depository or pursuant to a corrupt agreement made by the trustee or receiver for his personal benefit.

STATEMENT.

Three suits at law were brought in the United States District Court for the Northern District of Illinois, Eastern Division, in the name of United States of America on the relation of Chester A. Willoughby, acting in his capacity as Trustee in Bankruptcy of 114 bankrupt estates and as Receiver in Bankruptcy of 9 other bankrupt estates, against Sam Howard, one of the respondents herein, upon his official bonds as Trustee in Bankruptcy and as Receiver in Bankruptcy of said bankrupt estates, and against Continental Casualty Company, a corporation, the other respondent herein, as surety upon all of said official bonds.

During the month of May, 1934, Howard resigned as trustee or receiver in all of said estates and was succeeded by Chester A. Willoughby who, as such trustee and receiver, is the petitioner herein. All of said bankrupt estates were subject to the jurisdiction of the District Court of the United States for the Northern District of Illinois, Eastern Division. These three suits involve all 123 of said estates, and, by agreement of all the parties, were consolidated for trial, and tried by said District Court. (R. 51.)

The undisputed evidence, largely testimony of the defendant Howard and other testimony given on behalf of the defendants, showed as follows:

That prior to August 25, 1930, Howard as trustee and receiver kept funds of his bankrupt estates

on deposit in the Central Trust Company of Illinois and the Foreman-State National Bank, both of which were banking corporations located in Chicago, Illinois. (R. 169, 256-258.) He had personal unsecured loans of $2,500.00 at the Central Trust Company and of $7,000.00 at the Foreman Bank. (R. 258.)

That shortly prior to July 15, 1930, Clarence A. Beutel, a vice president of the Central Trust Company, advised Howard that he anticipated becoming president of the Phillip State Bank and Trust Company of Chicago (hereinafter called the "Phillip Bank") and invited Howard to change his estate deposits from the aforesaid banks to the Phillip Bank (R. 164, 256), although at that time the Phillip Bank was not a depository qualified to accept the funds of bankrupt estates. (R. 143.) Howard replied that he was not a man of any means and if he transferred his estate deposits to the Phillip Bank he would wish to obtain an unsecured loan from that bank to liquidate his other loans above mentioned. (R. 257.) Beutel told Howard that the Phillip Bank would make him a loan so that he could liquidate said loans with the Central Trust Company and the Foreman Bank (R. 165, 257) and also would loan him such further sums as Howard required to conduct his business.

That a like understanding was entered into between Howard and Bernard L. Rosset, chairman of the board of the Phillip Bank. (R. 203.)

As a result of said arrangement between Howard and Beutel, the Phillip Bank loaned $5,000.00 to Howard on his unsecured note on August 6, 1930, and loaned him the further sum of $6,000.00 on August 19, 1930, a total of $11,000.00 as against the total loans of $9,500.00 which Howard then had with the Central Trust Company and Foreman Bank. (R. 77, 79, 258.)

Thereafter, on August 20, 1930, the Phillip Bank filed a bankruptcy depository bond for $50,000.00 (R. 113) and qualified to act as such depository. Between August 25,

and August 31, 1930, Howard deposited in the Phillip Bank, in his capacity as trustee or receiver of said estates, the sum of $249,968.15. (R. 73.)

The last published statement of the financial condition of the Phillip Bank prior to the making of said deposits, was as of June 30, 1930, and showed liabilities of $4,367,897.93, of which $1,610,294.96 were demand deposits, and $1,858,076.90 were time deposits. (R. 84.)

Commencing with the initial deposits of $249,968.15, the deposits in the Phillip Bank of Howard as trustee or receiver increased until at the time said bank failed on June 21, 1932, said deposits amounted to $416,833.90, the largest deposits Howard had in said bank at any time. (R. 72.)

The original personal unsecured loans of $11,000.00 made to Howard in August, 1930, increased to $18,515.00 on July 11, 1931, and amounted to $17,500.00 on June 21, 1932, the date said bank failed. (R. 77, 78.)

During the period that Howard was increasing his deposits as trustee and receiver in the Phillip Bank, said bank underwent five serious runs. A run in April, 1931 (R. 169) required the borrowing of $1,000,000.00. Another run occurred in June, 1931. (R. 171, 176.) A run in September, 1931 (R. 176, 177) required the borrowing of about $500,000.00; and a run in December of 1931, cost the bank $500,000.00 (R. 177.) The fifth run resulted in the failure of the bank on June 21, 1932. (R. 178.)

Howard had knowledge of each of these runs (R. 169, 171, 173, 176, 177, 192, 193) and discussed them with officers of the bank (R. 259-263), and, in addition, was charged with knowledge of the publications required by the Auditor of Public Accounts of the State of Illinois

of the condition of the bank (R. 271), said publications showing the condition of said bank as of the following dates: June 30, 1930 (R. 84); September 24, 1930 (R. 86); December 31, 1930 (R. 89); March 25, 1931 (R. 91); June 30, 1931 (R. 93); September 29, 1931 (R. 96); December 31, 1931 (R. 98); and March 30, 1932 (R. 100). Said statements in each instance were published shortly after the date as of which they were made. Howard admitted that he had received the quarterly reports and indicated that he had looked at them and then thrown them away. (R. 271.)

While Howard was increasing the amount of estate moneys deposited in said bank and increasing his personal borrowing therefrom, its demand and time deposits, as a whole, were decreasing. On March 25, 1931, demand deposits were $2,481,918.79 and time deposits were $1,329,-$720.39. (R. 92.). On December 31, 1931, demand deposits had decreased to $1,938,427.13, of which $252,461.18 were deposits of said Howard's estates, and time deposits had decreased to $655,357.11. (R. 72, 98.) At the time said bank closed the total deposits, both demand and time, were $2,101,710.51, of which $416,833.90 were deposits of Howard's estates. (R. 72.) From August, 1930, to the closing of the Phillip Bank, Howard's estates were from 13.98% to 25.65% of all demand deposits and from 28.09% to 74.21% of the cash and government securities held by said bank. (R. 72.)

The moneys of 123 bankrupt estates here involved are a portion but not all of the estate moneys which Howard had on deposit with the Phillip Bank. (R. 72.)

No evidence was offered to show that any loss ever was suffered by any depositor in the Central Trust Company or Foreman Bank.

After the failure of the Phillip Bank, its $50,000.00 depository bond was collected and paid in reduction of the loss to the bankrupt estates whose money was on deposit in said bank, which resulted in a distributive dividend to each of said estates of 11.0461% of the estate money on deposit. (R. 13-28, 61, 67.) The amount for which suit was brought in these cases was the amount on deposit in each of the estates here involved at the time the Phillip Bank failed, less the amount of such distributive dividend, except in the case of estates in which the trustee's or receiver's bond was less than the amount on deposit after crediting the above-mentioned distributive dividend, in which case the amount sued for was the full amount of the bond. (R. 61-64, 67.) The amount sought to be recovered was $5,439.22 on the trustee's bond in one suit (R. 61), $197,076.31 on 113 trustee's bonds in another suit. (R. 64), and $23,224.92 on 9 receiver's bonds in a third suit (R. 67), an aggregate of $225,740.45.

The conditions of the official bonds of Howard as trustee or receiver were in substance that he and his surety were to be liable for losses resulting to said estates upon:

(a) Failure of Howard to obey any order of the Court.

(b) Failure of Howard faithfully and truly to account for all of the moneys, assets or effects of the estates.

(c) Failure of Howard in all respects faithfully to perform all of his official duties as trustee or receiver. (R. 59, 65.)

The complaint set forth in separate counts the deposit of each estate in the Phillip Bank and other factual data sufficient to establish the amount of the loss suffered by each estate as a result of the closing of said bank and

the portion of such loss covered by Howard's official bonds. Said complaint also set forth the relationship of Howard to the Phillip Bank, the history of the runs thereon and the fact that Howard knew of the condition of said bank, and alleged that he negligently and carelessly permitted the moneys of said estates to remain on deposit in said bank, that he did not faithfully and fully account for the moneys of the estates, did not faithfully perform his duties as trustee or receiver, did not report in writing the condition of the estates, and that he did not exercise reasonable care, prudence and caution in his official capacity.

The jury rendered verdicts for the plaintiffs in each of said three suits, in the aggregate amount of $225,740.45 (R. 52, 383), the full amount claimed, and judgment was entered for the plaintiffs in the full amount of said verdicts. (R. 56.)

The defendants appealed to the United States Circuit Court of Appeals for the Seventh Circuit, said appeal being argued before the Court on May 19, 1936, Judges Evans and Lindley sitting. (R. 391.)

Thereafter, said Court ordered a re-argument of said appeal, which was heard on November 18, 1936, by Circuit Judge Evans and District Judges Lindley and Briggle. (R. 392.) On January 8, 1937, Circuit Judge Evans filing a dissenting opinion (R. 402), the Circuit Court of Appeals reversed the judgment of the District Court and remanded the case for a new trial, in accordance with directions contained in said opinion, said directions in substance being to direct a verdict for the respondents and not to submit to the jury the question of whether Howard was negligent in making deposits in a designated depository. (R. 393.) The plaintiffs thereupon petitioned the

Court for a rehearing which was denied on January 29, 1937. (R. 406.)

Thereafter, on May 24, 1937, this Court granted the petition of said Chester A. Willoughby, as Trustee in Bankruptcy, *et al.*, for a writ of certiorari to said Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(a) In reversing the judgment of the District Court.

(b) In holding that the loss of estate moneys because of the failure of a trustee or receiver in bankruptcy faithfully to perform his official duties, is not chargeable to his surety.

(c) In holding that loss resulting from the failure to exercise ordinary care, or from negligence of a trustee or receiver in bankruptcy in depositing or maintaining deposits of his estate moneys, is not chargeable to his surety.

(d) In holding that the loss of estate moneys resulting from corrupt agreements or acceptance of personal favors by a trustee or receiver in bankruptcy in consideration of depositing and maintaining bankrupt funds in a particular depository among several, is not chargeable to his surety.

(e) In holding that the surety on a bond of a trustee or receiver in bankruptcy cannot be charged for the loss of bankruptcy funds resulting from negligence or malfeasance in office of the trustee or receiver in bankruptcy in depositing and maintaining excessive amounts belonging to numerous estates in one designated depository when there was a choice available among a number of such depositories.

(f) In holding that under the provisions of the Bankruptcy Act, the surety can constitutionally be relieved by the Bankruptcy Act for negligence or malfeasance in office, resulting in the loss of bankruptcy funds, committed by a trustee or receiver in bankruptcy in depositing and maintaining of bankruptcy (private) funds in a designated depository.

SUMMARY OF ARGUMENT.

I.

The Circuit Court erred in setting aside the judgment of the District Court based upon the verdict of the jury.

II.

Howard violated each of his official bonds.

A. *Howard failed to obey the orders of the Court.*

B. *Howard failed to account.*

C. *Howard failed to perform his official duties.*

III.

The liability of his surety is coextensive with that of the Trustee or Receiver in Bankruptcy in respect of all losses resulting from official acts or omissions of such Trustee or Receiver.

A. *The surety company's liability.*

B. *The opinion of the Circuit Court.*

C. *The Federal rule as to the liability of sureties on official bonds.*

IV.

Negligence, or a failure to exercise ordinary care in the performance of a statutory duty, entering into corrupt agreements, accepting personal favors, or accepting compensation other than as allowed by law are violations of the official bond of a Trustee or Receiver in Bankruptcy.

V.

The public fund depository system (31 U. S. C. A. Sec. 476) and the plan provided in Section 47 of the Bankruptcy Act (11 U. S. C. A. Sec. 75) and Section 61 of the Bankruptcy Act (11 U. S. C. A. Sec. 101) have no direct relationship to each other.

VI.

Neither the federal nor state cases are in conflict with the verdict of the jury or the judgment of the trial court as to the liability of Howard and his surety.

VII.

Neither the Congress of the United States nor the State Legislatures can constitutionally relieve public officials or quasi-public officials of the United States or the States from liability from the results of their negligence.

VIII.

The record discloses no error in the trial which is prejudicial to the defendants, or either of them.

Conclusion.

ARGUMENT.

I.

The Circuit Court erred in setting aside the judgment of the District Court based upon the verdict of the jury.

The majority of the Circuit Court of Appeals concluded its opinion as follows:

> "Howard's knowledge of the condition of the bank and his personal loans there, are to our mind facts immaterial in an action upon these bonds. They constitute no breach of the conditions. What their legal effect may be in an action against the Trustee personally, we are not called upon to decide." (R. 402.)

The implication of the foregoing is that in selecting a depository and placing and maintaining bankruptcy funds therein, a trustee or receiver in bankruptcy may be guilty of a lack of every care or precaution which a reasonably cautious man would exercise in the care of his own funds, that he may ignore obvious dangers to the funds caused by the unsound financial condition of the depository, runs thereon, loss of capital, bad management, or even the failing condition thereof. He may place bankruptcy funds therein because of corrupt agreements, motives of personal gain, or personal favors and may cause various depositories to bid for such funds by the promise of favors. He may, without regard to the strength of the depository, deposit therein bankruptcy funds many times the amount of the depository's bond. Yet, if bankruptcy funds are lost by reason thereof, he is not liable in such a manner as to charge the surety on his official bonds. Such a suggestion

is entirely new in the law of trusts, suretyship and bankruptcy.

In arriving at this conclusion, the Circuit Court ignored the fact that one of the duties of the trustee or receiver is to "deposit all money received," and that the only limitation on the place of deposit is that it must be "one of the designated depositories." (11 U. S. C. A. 75 (a) (3).)

The majority of the Circuit Court erroneously assumed that no discretion or duty of selection among designated depositories was vested in the trustee or receiver in depositing and maintaining deposits of estate moneys.

In August, 1930, when Howard made the original deposits in question, there were in Chicago twenty-one different banks that were qualified as depositories for bankrupt funds. (R. 112, 113.) At all times thereafter while Howard had estate moneys in the Phillip Bank, there were a substantial number of such depositories. The duty of the trustee or receiver being to deposit and keep such funds in a designated depository, Howard had the duty and discretion of selecting any one or more of the designated depositories to hold the funds of his estates. In placing and maintaining all of such funds in a single depository he could not ignore the knowledge which he had or should have had about such depository and which might affect the safety of money deposited and maintained therein by him as such trustee or receiver.

This duty of selection was solely Howard's. Each time that he made a deposit for any bankrupt estate, and at all times while he maintained such deposits, he was under obligation to exercise at least the degree of care which a reasonable man would use in depositing and maintaining deposits of his own funds if he were limited to banks that were designated depositories.

Howard voluntarily prejudiced his judgment and ability to perform his duty of selecting between designated depositories in the following manner:

Within one month prior to July 15, 1930, Clarence A. Beutel told Howard that he was about to become president of the Phillip Bank (R. 164) and requested Howard to make bankruptcy deposits therein. Discussion of this matter continued after Beutel became president of the Phillip Bank and included Bernard L. Rosset, Chairman of said bank. As a result, Howard, who had been depositing his bankruptcy funds in the Central Trust Company of Illinois and the Foreman Bank (R. 203, 255, 257), obtained an agreement from them that, in consideration of transferring and depositing his bankruptcy funds in the Phillip Bank, said Bank would make to Howard, personally, unsecured loans sufficient to pay unsecured loans which he then had with the Foreman Bank and the Central Trust Company, and, in addition, would give him further unsecured loans. (R. 257-8.) Thus, three things are evident,—first, that an agreement solely for his personal benefit was exacted by Howard for making and maintaining deposits, as trustee or receiver in bankruptcy, in the Phillip Bank after it became a designated depository; second, that Howard considered it necessary to have an agreement that loans would be made to him, before he felt free to take his bankruptcy funds out of one depository and place them in another; and, third, that he felt unable to remove the bankruptcy funds from the Central Trust Company and the Foreman Bank until he was able to pay the personal unsecured loans which he had therein. (R. 203, 257.) Subsequent larger borrowing and critical conditions in the Phillip Bank, where he thereafter made much larger deposits, necessarily greatly accentuate the mental limitations that he had when he transferred his bankruptcy funds thereto. (R. 77, 78, 203.)

There is no time or circumstances in which a person, occupying an official position of trust, can be justified either in absolute negligence or bad faith in performing an official duty, whether it be in the exercise of discretion in selecting between depositories, or otherwise.

Under the theory of the Circuit Court of Appeals, the designation of several depositories by the District Court permits a trustee or receiver maliciously to seek out the depository most likely to fail and to keep all of his estate moneys therein without any liability arising therefrom upon his official bond.

II.

Howard violated each of his official bonds.

The official bonds of Howard required (a) that he should obey such orders as the Court might make with relation to the trust; (b) that he should faithfully and truly account for all the moneys, assets and effects of the estate of each of said bankrupts which should come into his hands and possession; and (c) that he should, in all respects, faithfully perform all his official duties as trustee or receiver. (R. 59, 65.)

A. *Howard failed to obey the orders of the Court.*

Evidence was introduced that Judge Carpenter, on July 1, 1931, entered an order requiring *receivers* to report to the Court the amount of funds in all depositories. (R. 145.) No such report by Howard from June 9, 1931, until after June 21, 1932 (the date of closing of the Phillip Bank), was produced. Secondary evidence was given to indicate that something had been taken to the clerk's office from time to time. (R. 145, 153, 159, 184, 185, 187, 188, 204, 252, 277.) The jury

was entirely justified in believing that Howard had not made any such report of the amount on deposit in the bank, save to a deputy clerk, on June 9, 1931, and none pursuant to the Court's order. Hence, if the order of July 1, 1931, by Judge Carpenter was the character of an order contemplated in the statutory duties of Howard, there was no primary evidence that he ever made a report of the funds in all of his bankrupt estates during the entire time that the funds were in the Phillip Bank.

B. *Howard failed to account.*

The jury also was justified in believing that Howard had violated the provision of the bonds requiring him to "faithfully and truly account for all the moneys, assets, and effects of the estate * * * which shall come into his hands and possession, * * *." (R. 59, 65.)

In 1 C. J. S. 576, the author states:

> "The verb 'account' is frequently employed with 'for,' and the term 'account for,' has, in various adjudications, been interpreted to mean paying over the money to the person entitled thereto; hence more than merely filing an exhibit or statement of account." (Citing authorities.)

The question of the duty of a fiduciary is considered under such an expression in the bond in *Hale County, Texas* v. *American Indemnity Co.*, 63 F. (2d) 275, on page 279 (C. C. A.). See, also, *U. S.* v. *Rehwald, et al.*, 44 F. (2d) 663, and cases cited therein.

It was contemplated by the bonds that moneys would come into Howard's hands, both as trustee and receiver, and be accounted for. It was not accounting for money to place and keep it in a depository known to be on the verge of failure, or, in handling the funds which

came into his hands, to limit his power to act by making corrupt agreements or taking special favors.

Also, there was an unconscionable amount of money continually kept on deposit and Howard had the primary duty of distributing such money. (11 U. S. C. A. 75 (a) (2).) Howard had $416,833.90 of estate moneys on deposit in the Phillip Bank when it closed. (R. 72.) For example, $132,707.00 went on deposit on August 25, 1930, to the credit of the National Theatre Corporation (R. 73), and $52,174.17 still was on deposit to the credit of such account at the time the bank closed, with only a $1,000 bond. (R. 24.) Because of the delay in payments, if for no other reason, and the final loss because of such delay, there was not a faithful accounting. A delay in payment of dividends can be a breach of duty to account. (See Judge Evans' dissenting opinion herein. (R. 403.) See, also, *State* v. *McNamer,* 62 Mont. 490, 205 Pac. 951; *Amer. Surety Co.* v. *Public Schools,* 70 F. (2d) 653 (C. C. A. 6 C.); *Slope County* v. *Douglas,* 49 N. D. 1026, 194 N. W. 385.)

C. *Howard failed to perform his official duties.*

There was a breach of the provision of the bonds requiring Howard, as trustee or receiver, "to faithfully perform all his official duties as such officer." The occasion for requiring a depository bond is protection of the funds of bankrupt estates which are on deposit. (Gilbert's Collier on Bankruptcy, 2d Ed., Sec. 101 (b), page 929.) The bond required by statute was intended to protect the deposits. The condition of the bond of a trustee or receiver in bankruptcy is breached by the negligence, without corruption, of the principal in the performance of even a ministerial duty. (*U. S.* v. *Perkins,* 280 F. 546

(C. C. A.); *In re Hoyt, et al.*, 119 F. 987.) As is pointed out by Judge Evans, and as is shown in each bond, Howard occupied a trust or a fiduciary relationship. (R. 60, 65, 403.) (25 C. J., page 1118.) See also, *In re Lenters*, 225 F. 878, 883 (D. C. Pa.) and *Rodgers* v. *Bankers Nat. Bank*, 179 Minn. 197, 229 N. W. 90, 91.

It is a general rule that where, by statute, an official is required to deposit in a particular depository, this does not relieve such official from liability for malfeasance, misfeasance or non-feasance in the care of funds. (*Jordon* v. *Baker*, 252 Ky. 40, 66 S. W. (2d) 84, 93 A. L. R. 813; *Edwards* v. *Logan County*, 244 Ky. 296, 50 S. W. (2d) 83; *State* v. *McNamer*, 62 Mont. 490, 205 Pac. 951.) A public or quasi-public officer is liable for misconduct in the performance of his duties. (46 C. J., Sec. 398, page 1068, and Sec. 401, page 1069.) In fiduciary relationships involving trusts, a trustee or fiduciary may not place himself in a position in which his self interest will or may conflict with his duty as trustee. (65 C. J. 520, page 652; *Booth* v. *Greer Investment Co.*, 52 F. (2d) 857, 860 (D. C. Okla.); *Bennett* v. *Weber*, 323 Ill. 283, 294, 154 N. E. 105, 109.) Furthermore, a trustee or receiver must act in good faith and with ordinary prudence in making and maintaining deposits in a bank, otherwise he is liable for a loss occasioned by the failure of such bank. (53 C. J., Sec. 194, page 156; 65 C. J., Sec. 566, page 701, and Sec. 519, page 647; see, also, *Fidelity & Deposit Co.* v. *Redfield*, 7 F. (2d) 800 (C. C. A. 9th C.).) And every violation by a trustee whether wilful or neglectful is a breach of trust. (*Natl. Surety Co.* v. *State*, 152 Md. 71, 136 Atl. 274; *Thompson* v. *Hays*, 11 F. (2d) 244 (C. C. A. 8 C.).)

It will be observed that these principles apply to making and maintaining deposits, excessive or otherwise, to the several runs on the Phillip Bank, to the reduction in the

deposits, and to the various notices which came to Howard from the officers of the bank (R. 169-178, 192-196, 259-263), from publications (R. 83-101, 271) and other sources. (R. 117-118, 120, 123-128.) Notice of facts which would put a man of ordinary prudence on inquiry under similar circumstances will be construed as notice of all the facts which a reasonably diligent inquiry would disclose. This is a basic rule of trusts and applies equally to the handling of bankruptcy funds by a trustee or receiver in bankruptcy. (46 C. J., Sec. 28, page 543; *Essex National Bank* v. *Hurley,* 16 F. (2d) 427 (C. C. A. 1st C.); *Grandison* v. *National Bank of Commerce,* 231 F. 800, 809 (C. C. A. 2d C.); *Martin* v. *Federal Surety Co.,* 58 F. (2d) 79 (C. C. A. 8th C.); *Coder* v. *McPherson,* 152 F. 951 (C. C. A. 8th C.); *McClean* v. *Bradley,* 282 F. 1011, Aff. 299 F. 379 (C. C. A. 6th C.), Cert. Den. 266 U. S. 619, 69 L ed. 471.)

III.

The liability of his surety is coextensive with that of the Trustee or Receiver in Bankruptcy in respect of all losses resulting from official acts or omissions of such Trustee or Receiver.

A. *The surety company's liability.*

Because of the large number and amount of the bonds which it issued on Howard, 123 being involved in this case, the surety at all times had a knowledge that it was heavily involved in his bankruptcy transactions and that, to the extent of its bonds, it was contracting "to pay losses which might arise (1) from failure of Howard to obey an order of the Court; (2) from failure upon his part faithfully and truly to account for the moneys of the estates; and (3) from failure by him faithfully to perform 'his official duties as said trustee.'" (R. 5, 396.)

It is stated in 46 C. J., Sec. 398, page 1068, that:

> "Where an officer, acting in a matter in which he is authorized to act, is guilty of official misconduct, he is not faithfully performing his official duties, and he and his surety are liable on his official bond for resultant damages. The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion."

And, of course, it follows that any act which, if done genuinely and honestly by an officer would be an official act, is, if done negligently and recklessly, an act done by virtue of his office and the sureties on his bond conditioned for the faithful discharge of the duties of his office are liable for injuries resulting therefrom.

See, also:

National Bank of Redemption v. *Rutledge*, (C. C.) 84 F. 400.

There is no limitation in the bonds as to the manner in which the duties of the officer should be performed. (R. 59, 65.) It follows, therefore, that the surety is liable for losses caused by Howard's negligence, to the full extent of the bonds that were issued to secure the faithful performance of his official duties.

B. *The opinion of the Circuit Court.*

A number of Courts have adopted a distinction between acts which are *virtute officii*, that is where the breach occurs in a matter connected with the actual duties of the office, and those which are *colore officii*, and have stated that sureties may not always be liable for breaches of duties or money lost where the acts are merely *colore officii*. The

definition of the terms is given in 67 C. J., page 255. In 11 C. J., page 1225, note 13, there is a discussion of these two phrases and an indication that it is quite rare that, where a negligent act is done within the scope of official authority, the sureties can escape liability by stating that the act was merely done *colore officii*, and to the same effect is 22 R. C. L., Sec. 190, page 507, note 2, and 46 C. J., Sec. 401, page 1069.

In the majority opinion in this case, the Circuit Court stated (R. 398), in referring to the surety on a bond:

> "He does not consent to become liable for *any* act in which the officer may become engaged in the pursuit of his office. Otherwise stated, an officer may so act as to render himself personally liable as a matter of general law, but it does not follow necessarily that his official bondsmen are liable. The liability of sureties is limited to that for breach of official duties of the principal, and does not include an undertaking against every act that the official may perform or every failure to act of which he may be guilty." (Italics ours.)

In making the above statement, the majority of the Circuit Court has adopted the minority rule as to sureties' liability on bonds.

The Circuit Court cited the case of *Lowe* v. *City of Guthrie*, 4 Okla. 287, 44 Pac. 198, as authority for the proposition that the liability of a surety is not necessarily co-extensive with that of his principal. In that case when referring to the duties of a city clerk, the Court therein stated:

> "mere officiousness of the clerk in the assumption of duties not belonging to his office, or the negligence of other officers in the discharge of their duties, cannot extend to the sureties' liabilities beyond the term of their undertaking. (*People* v. *Pennock*, 60 N. Y. 421; *Supervisors* v. *Bates*, 17 N. Y. 242.)"

In the instant case, Howard's violations of his bonds were solely in performing the duties of his office and no other officer was involved. It was Howard's responsibility to select the depository among those which had been designated by the District Court, and to deposit his estate funds in such designated depositories as he might select. (11 U. S. C. A. 75 (a) (3).) It was Howard who arranged to receive personal loans in consideration of placing his estate funds in the Phillip Bank and by such action destroyed his ability, then or thereafter, to properly appraise its soundness or to act pursuant to the information which he had regarding said Bank. (R. 258.) *Each of these acts was done by Howard virtute officii and, accordingly, the case cited is in no way parallel to the situation here involved.*

The following cases (R. 398) also were cited by the Circuit Court as authority for the proposition that Howard could be liable without subjecting his surety to a like liability:

City of Salisbury v. *Lyerly,* 208 N. C. 386, 180 S. E. 701: This case held that a shortage on a bond as treasurer of a city would not make the bondsman liable for a shortage of the same person as tax collector; *District of Columbia* v. *Petty,* 229 U. S. 593, 57 L. ed. 1343, held that a bond as auditor would not make the bondsman liable for the defalcation of a disbursing clerk who was responsible to the District of Columbia Commissioners; *Orton* v. *City of Lincoln,* 156 Ill. 499, 41 N. E. 159, held that a bond on the city clerk making him responsible for all money that should come into his hands by virtue of his office would not make the bondsman liable for money that was collected by the city clerk which should have been collected by the city treasurer, as was also the case in *Lowe* v. *City of Guthrie,* 4 Okla. 287, 44 Pac. 198, *supra; Campbell* v. *American Bonding Company,* 172 Ala. 458, 55 So. 306, held that sure-

ties on the official bond of the executor of an estate are only liable for assets which belong to the estate of which he is executor; *Wilkes Barre* v. *Rockafellow,* 171 Pa. 177, 33 Atl. 269, 270, held that the sureties on the bond of the city treasurer are not liable for the loss of the sinking fund of the city which was under the control of sinking fund commissioners and lent by them to the person who was the city treasurer.

It is apparent that in all of the above cases the surety was relieved from liability because the liability of the principal arose out of acts not connected with his office. Such was not the situation in the instant case and, therefore, these citations have no application here.

Nor can we understand why the Circuit Court cited the case of *City of Parsons* v. *Fidelity & Deposit Co.,* 29 F. (2d) 417, for on appeal said case was reversed, 43 F. (2d) 315 (C. C. A. 10 C.), and the surety was held liable.

None of the cases cited is an authority for relieving either Howard or his surety from liability, in the present situation, and on the contrary, show that the underlying theory on which sureties are held liable, applies to the instant situation. Here there was not only gross negligence in the performance of official duties, but a contract with the depository which might readily be called corrupt. The leading case in the Federal Court on the effect of negligence of trustees in bankruptcy is *United States* v. *Perkins,* 280 F. 546 (C. C. A. 8th C.), where the Court said, page 549:

> "Sureties on official bonds are liable for negligence or malfeasance of their principal in the performance of acts which are done *virtute officii. The bond providing only for the faithful discharge of the principal of his official duties, the condition of the bond is considered to have been broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does involve the*

> *exercise of discretion, and, where the duty which has not been faithfully discharged was owing to the person injured, such person may sue on the bond.* By the weight of authority, acts done by color of office are regarded as acts for which sureties on official are liable. 29 Cyc. 1455, 1456, and cases cited." (Italics ours.)

In the foregoing case, which involved the breach of a bond of a trustee in bankruptcy, the court held the sureties liable for acts of a fraudulent nature when done merely under color of office.

In the instant case, the Circuit Court, in referring to the bonds, correctly states:

> "The instrument is required by a statute which defines its terms, and the law of the office is a part of the contract. The surety guarantees the faithful discharge of all duties properly pertaining to the office, and the extent of such liability can be determined only from the bond and from the statutes creating the office and defining the terms of the bond." (R. 398.)

For the violation of his official duties, as herein set forth, Howard's sureties are undoubtedly liable.

We agree with the statement of the Circuit Court: "If he has authority to select the depository, and no other body has any power of such selection, he is not relieved." (Citing *State* v. *Bobleter,* 83 Minn. 479, 86 N. W. 461.) (R. 400.) There is an intimation by the Court, however, that Howard had no power of selection, whereas it is an undisput d fact that at all times he had numerous qualified depositories to choose between. (R. 112.)

The statement of the Circuit Court: "Nor is the size of the bond a warning to him of the amount he may deposit in a depository" (R. 400) is not supported by the

only cases cited by that Court in support of this proposition:

City of Billings v. *Mass. Bonding & Insurance Co.*, 88 Mont. 91, 290 Pac. 246. In this case the city treasurer, whose sureties were sued, was expressly exempted by statute from liability for loss of funds in the depository.

Illinois Surety Company v. *U. S.*, 226 F. 665. The language (R. 400) quoted from this case without the context gives an entirely erroneous impression. The suit was on a depository bond and the query that arose was whether all depositors should share alike in the proceeds thereof or be paid in the order of the deposit in the bank by the various receivers and trustees. The question, answered by the language quoted from page 667, was whether each depositor, before he made his deposit, must ascertain whether his deposit would cause the total sums of deposits to exceed the depository bond. The question of liability of the trustee or receiver for depositing amounts in excess of the depository bond was not before the Court.

Whether "designated depositories" are "officers of the court" (R. 400) is not of importance in the instant case. In a few States bonds are given directly to States or municipalities, usually where bids are taken for the right to become depositories, and the officials collecting the money and making deposits are mere ministerial officers without any possible personal liability save for their negligence in handling the funds prior to the time of making the deposits and having no responsibility in the selection of the depository. Such depositories are called "quasi public officers." Apparently the Circuit Court of Appeals in the *Illinois Surety Company* case, *supra*, did not so consider the depository in bankruptcy. It said, page 668:

> "That the possible beneficiaries of the depository's bond are a limited class, the depositors, and that the

bond is perhaps not, strictly speaking, an official bond, afford no basis for differentiating it from a trustee's or referee's bond. The United States is no more an active trustee for the depositors than for the general public."

The Circuit Court, however, in the instant case then proceeded to discuss the case of *Town of Hamden* v. *American Surety Company,* (D. C.), 9 F. Supp. 733, 738, *supra,* and quoted language from that decision which referred only to the Federal depository system for public officials and has no relationship whatever to the method of making deposits in bankruptcy matters.

We have not discussed all of the cases cited or referred to in the majority opinion of the Circuit Court of Appeals, but not one of them is authority for the decision of the Circuit Court in the instant case.

C. *The Federal rule as to the liability of sureties on official bonds.*

If trustees and receivers in bankruptcy are to be treated in the same category as public officials of the United States, the Federal rules as to the liability of sureties on public officials' bonds would apply and the various decisions of the several States would be of little value in determining the questions involved in this case. The earlier opinions of the Supreme Court of the United States held that where an official executed a bond "to faithfully execute all of the duties of his office," and the duties of such office required the collection and payment into the United States Treasury of public funds, his surety was liable for the payment of such funds into such treasury, and that if such money was stolen or destroyed without fault of the public official or lost in any way except by act of God, the bondsmen were liable.

The leading case supporting the so-called insurance rule is *United States* v. *Prescott,* 3 How. 578, 11 L. ed. 734, 738. This was followed by *United States* v. *Morgan,* 11 How. 154, 13 L. ed. 643; *United States* v. *Dashiell,* 4 Wall, 182, 18 L. ed. 319, 321; *United States* v. *Keehler,* 9 Wall. 83, 19 L. ed. 574, and *Boyden* v. *United States,* 13 Wall, 17, 20 L. ed. 527. Such cases involved receivers of public moneys, collectors of ports and postmasters.

Although the Supreme Court previously had held, in *Bevans, Receiver* v. *United States,* 13 Wall. 56, 20 L. ed. 531, that the receiver of public money was liable for money seized by the Confederate Government, the Court reconsidered the entire subject in *United States* v. *Thomas,* 15 Wall. 337, 21 L. ed. 89. Thomas was Surveyor of Customs at Nashville, Tennessee, and the money involved was seized by the Confederate Government. The Court called attention to the strict rules as to receivers of public moneys, as laid down in the foregoing cases, and finally stated on page 92:

> "Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same."

And later after examining a number of cases, including the *Prescott* case, the Court summarized on page 93:

> "It is unnecessary to examine the cases further in detail. It appears from them all (except, perhaps, the New York case) that the official bond is regarded

> as laying the foundation of a more stringent responsibility upon collectors and receivers of public moneys. It is referred to as a special contract, by which they assume additional obligations with regard to the safe keeping and payment of those moneys, and as an indication of the policy of the law with regard to the nature of their responsibility."

The Court in the above case held that the taking of the money by the Confederate Government was an act of "over-ruling necessity" which might be classified with acts of God and which rendered the sureties not liable, but in effect restated the insurance doctrine theretofore laid down.

As late as *Smythe* v. *United States,* 188 U. S. 156, 47 L. ed. 425, the superintendent of the mint of the United States in New Orleans was held personally responsible on his bond for the destruction by fire of public money in his custody, including interest on such money. All of these matters were considered in *Town of Hamden* v. *American Surety Company,* 9 F. Supp. 733. Subsequent to these decisions the Federal Government adopted a policy of requiring officials to deposit public funds with the Treasurer of the United States or a depository thereof, such depository to be designated in conformity with 31 U. S. C. A., Sec. 476, which statute with 12 U. S. C. A., Secs. 391, 392, authorized the secretary of the treasury to designate any of the Federal Reserve Banks as depositories. As the Circuit Court of Appeals said in its opinion in the instant case:

> Such funds "'when once deposited with a duly designated depository of the United States, are in effect in the treasury of the United States and hence no longer in the possession or custody of that receiving officer.'" (R. 401.)

All of this language, however, in connection with the instant case has no relation to the depository system as laid down by the statutes relating to the Bankruptcy Depository System, save that they may be taken as indicating the policy of the Federal Government with reference to sureties on bonds prescribed by statutory enactment and showing the strict responsibility which always has been, and now is, placed upon such sureties upon their entering into such bonds.

The statute relative to trustees in bankruptcy provides, in U. S. C. A., Title 11, Sec. 78 (b):

> "Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties."

The actual form of the bonds has been adopted by the Supreme Court of the United States pursuant to U. S. C. A. 11, Sec. 53, as Form No. XXV. It is agreed by the parties hereto that the bonds of the receiver and the trustee are of the same legal effect. Thus, both the giving and the form of the bond are provided by statute. The depositories of bankruptcy funds are designated under Sec. 101 of Title 11 and are required to give bonds to the United States, and it also provided that the District Court may:

> "* * * increase the number of depositories or the amount of any bond or change such depositories."

In *Huttig Mfg. Co.* v. *Edwards,* (C. C. A.), 160 F. 619, the Court said, page 622:

> "Section 61 of the bankruptcy act, makes it the duty of courts of bankruptcy to designate by order bank-

ing institutions as depositories of funds of bankrupt estates, and to require of them bonds *for the safe-keeping and forthcoming thereof.*" (Italics ours.)

In the instant case the depository bond has been paid in full and the amount of the judgment in the trial court was for the loss in excess of the depository bond covered by the bonds of Howard as trustee or receiver. The title to the property of the bankrupt vests in the trustee. (U. S. C. A., Title 11, Sec. 110.) The Court submitted the case to the jury on the theory that Howard was liable as a bailee and not that the surety on the bonds was liable for any excess of deposits beyond the depository bond under the general Federal rule of strict liability. (R. 297.) Presumably, however, we also may assume that under the Federal decisions, Howard is of the character of "special" bailees referred to in *United States* v. *Thomas,* 15 Wall. 337, 21 L. ed. 89, *supra.* In making the arrangements for transferring the funds from the Central Trust Company and the Foreman Bank and in all of his subsequent official transactions with the Phillip Bank, Howard was acting within the scope of his duties as trustee or receiver in bankruptcy. (R. 166, 192, 203, 259.) If in so acting he was negligent, reckless or corrupt, he violated his bond and his surety was liable for loss occasioned by such violation.

Howard offered to prove on trial that a portion of the money which was loaned to him was actually used in the conduct of the bankrupt estates. (R. 206-17, 254.) He did show that as a consideration for depositing the money in the Phillip Bank there was an agreement that he should be paid enough money to repay his loans at the Central Trust Company and the Foreman Bank. (R. 258.) The evidence was that he received more than enough money at once to make such payments and that there was

an agreement that he should also receive additional money as he desired it, and he received such additional money. (R. 258.) If this in any way hampered or fettered him in the performance of his official duties or, by affecting his judgment, caused him to be negligent with resultant loss to his estates, his surety was liable.

The loss resulting from his failing to act upon his knowledge of four runs upon the bank in 1931, of decreased deposits, of reduced assets, and of the fact that such runs normally cause the more readily convertible assets to be decreased, was the result of negligence and chargeable to him and his surety. If, in fact, the original contract to place his money in such bank was corrupt and led to the loss of his bankruptcy funds through the failure of the bank, then the surety is liable.

IV.

Negligence, or a failure to exercise ordinary care in the performance of a statutory duty, entering into corrupt agreements, accepting personal favors, or accepting compensation other than as allowed by law are violations of the official bond of a Trustee or Receiver in Bankruptcy.

As an officer of the Court, Howard was not in the same situation as a statutory federal official who collects taxes or public funds. The trustee has title to the funds of the bankrupt estates and the funds in the possession of both the trustee and receiver belonging to bankrupt estates are private funds as distinguished from public funds. (*Florida Bank and Trust Company* v. *Union Indemnity Co.*, 55 F. (2d) 640 (C. C. A.); *American Surety Company of New York* v. *Akron Savings Bank Company*,

74 Ohio St. 465, Aff. 212 U. S. 557, 53 L. ed. 651; *Lamb* v. *Townshend,* 71 F. (2d) 590, 592 (C. C. A. 4th C.); *Frank* v. *Salm,* 75 F. (2d) 747, 748 (C. C. A. 7th C.).) Such funds are deposited in the depository in the name of the trustee. (11 U. S. C. A. 75 (a) (3), and 110.)

In his dissenting opinion, in referring to Howard's responsibilities, Judge Evans said:

> "In other words, a trustee is one who occupies a fiduciary relation towards the creditors of the bankrupt. His is a position of trust. When the trustee, Howard, arranged with the bank to get a personal loan for a substantial sum and in return agreed to deposit the moneys which belonged to the creditors of the various estates for which he was trustee in the bank that loaned him personally the money, he failed in his plain duty to the creditors. He could not avoid the consequences of that failure if loss resulted through a failure of the bank, by showing that the bank wherein the money was deposited was a bank of deposit." (R. 403.)

In re Singer Furniture Corporation, 47 F. (2d) 780, 784, also held that the trustee or receiver occupies a fiduciary relationship. (See, also, page 21 hereof.)

In addition to incurring liability for negligence, as heretofore shown, Howard subjected himself and his surety to liability by depositing the money of his estates in the Phillip Bank pursuant to a corrupt agreement made with the officers thereof.

Black's Law Dictionary, second edition, defines "corruption" as follows:

> "Illegality; a vicious and fraudulent intention to evade the prohibitions of the law.
> *"The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." Citing cases.* (Italics ours.)

Bouvier's Law Dictionary defines "corruption" as:

> "An act done with an intent to give some advantage inconsistent with official duty and the rights of others."

In addition to the other violations of his official bonds, Howard used his office and the funds of his estates to obtain financial benefits neither contemplated nor permitted to him by law, by receiving, in effect, portions of his compensation as trustee and receiver prior to the time the law permitted him to do so. (R. 255-9.)

The Circuit Court cites certain cases as to the necessity of placing bankruptcy funds in designated depositories. (R. 400.) None are cited, however, which hold or even imply that a trustee or receiver in bankruptcy may ignore his knowledge of dangerous conditions when using one depository from among many, or that he may limit his freedom of action as trustee or receiver by placing himself under personal obligation. Obviously, where the statute requires an official to place his funds in a certain class of depository, and gives him the right to select between several within such class, the very selection is in itself a discretionary duty, in the exercise of which he is liable for negligence or bad faith.

The ordinary rule goes beyond the statements above made. Where a bond is given to secure moneys to be deposited in a designated depository, if the officer having charge of making the deposits places larger sums in the depository than the amount of the depository bond, under the apparent protection of such bond, such officer and his surety ordinarily are held liable as insurers for any excess beyond the amount of the depository bond. (*State* v. *U. S. Fidelity & Guar. Co.*, 210 Wis. 178, 246 N. W. 434, 436; *Roberts County* v. *Wickard*, 53 S. D. 511, 221

N. W. 246; *State* v. *Carney*, 208 Ia. 133, 217 N. W. 472; *Mass. Bonding & Ins. Co.* v. *Steele*, 125 Neb. 7, 248 N. W. 648; *Board of Comrs. of Grant Co.* v. *Soucek*, 128 Okla. 151, 261 Pac. 947, 949; *Anderson* v. *Peterson State Bank*, 191 Minn. 404, 408, 254 N. W. 459, 461; *Cheyenne* v. *Maryland Casualty Co.*, 13 F. (2d) 401 (D. C. Wyo.).) In other words, the protection that is given to the depositing officer is only to the amount of the penalty of the depository bond.

Howard's duty as a trustee or receiver in depositing and maintaining bankruptcy funds, was at least that of ordinary care. No decisions where an official and his surety are relieved from liability for negligence in the management of private funds committed to his care, have been shown.

In *Magruder* v. *Drury*, 235 U. S. 106, 59 L. ed. 151, at page 156, the Court stated:

> "It is a well settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity."

The above case follows *Michoud* v. *Girod*, 4 How. 503, 11 L. ed. 1076, wherein the Court stated, at page 1099:

> "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; * * * it acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger

> in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty."

These cases reflect the law which has been settled in this Court since 1846.

The liability of an officer for corruption exists whether or not the corrupt agreements are advantageous to such officer. However, in the instant case, such agreements did inure to the personal financial advantage of Howard at the expense of his estates. The estate moneys were removed from large centrally located Chicago depositories and placed in the Phillip Bank, a small outlying depository, pursuant to and in consideration of an agreement that the Phillip Bank would loan money to Howard as an individual upon his personal unsecured note, and there apparently was at least a tacit agreement that the deposits in the Phillip Bank would be increased as additional money was received by said estates or as Howard became trustee or receiver for other estates, or at least such was the result. (R. 72, 74.) The evidence clearly indicates that Howard could not obtain these personal unsecured loans from the Phillip Bank without transferring his estate moneys to such bank (R. 258), and it also appears probable that he could not have continued to maintain and increase these loans at such bank unless said deposits also were maintained.

Accordingly, Howard used his power over the estates to obtain a financial benefit other than the commissions to which he might have been entitled by law, by using the funds of the estates in the nature of security to enable him to obtain presently a portion of the commissions to which he anticipated that he would ultimately be entitled. These anticipated commissions were care-

fully estimated in connection with determining the amount of the loans to Howard. (R. 165, 258.) The power to borrow money has a definite and ascertainable present value and price. (See 65 C. J., Sec. 520, page 662.)

V.

The public fund depository system (31 U. S. C. A. Sec. 476) and the plan provided in Section 47 of the Bankruptcy Act (11 U. S. C. A. Sec. 75) and Section 61 of the Bankruptcy Act (11 U. S. C. A. Sec. 101) have no direct relationship to each other.

The opinion of the Circuit Court fails to distinguish between the depository system provided for public funds belonging to the United States and depositories provided for the receipt of bankruptcy funds under Sections 47 and 61 of the Bankruptcy Act, as we heretofore have shown. (Page 31 herein.) Funds deposited by tax collecting officers, when deposited in federal reserve banks in accordance with the statute, are assumed to be in the custody and possession of the United States, whereas bankruptcy funds, although required to be deposited in designated depositories, are private moneys, and title remains in the trustee. The failure of the Circuit Court to recognize this distinction in the instant case is apparent in that the Court discussed depositories which were officers, referring primarily in such discussion to State cases, and then discussed the case of *Town of Hamden* v. *American Surety Company*, 9 F. Supp. 733, *supra*, and quoted therefrom. The Court in that case had before it an action by a town against the surety on the official bond of the town treasurer involving a liability of a custodian of public funds in the State of Connecticut. The Court discussed the entire Federal and State system

of the deposit of public funds, but did not at any time consider the question of the deposit of the funds of bankrupt estates. The language quoted therefrom by the Circuit Court, in the instant case (R. 401), was solely with reference to public funds of the United States coming into the possession of the United States when deposited in a public depository of the United States.

Accordingly, in so far as the decision of the Circuit Court is based upon the language of that case and of the State cases therein referred to, such decision necessarily is erroneous. The Circuit Court did not quote that portion of the Town of Hamden case where the Court said, page 738:

> "The policy of these statutes and the unqualified undertakings of official bonds given in conformity therewith, the Supreme Court has indeed declined to relax."

VI.

Neither the federal nor state cases are in conflict with the verdict of the jury or the judgment of the trial court as to the liability of Howard and his surety.

The question of liability on bonds of public officers under the Federal decisions heretofore has been discussed. (Page 29 herein.) The entire subject is considered in great detail in a note in 93 A. L. R. on page 819, where the author states:

> "Upon the general question there exists an irreconcilable conflict of opinion. The weight of authority, numerically at least, adheres to a doctrine of strict liability, holding that such an officer is not to be exonerated by any consideration of honesty, diligence, and faithfulness in the case of the loss of public money while in his hands, unless the loss shall have

been occasioned by the act of God or the public enemy."

In *Town of Hamden* v. *American Surety Co.*, 9 F. Supp. 733, *supra*, heretofore referred to (pages 29, 31, 39 herein), the Court, in its elaborate consideration of the general subject, after indicating that as to the question of sureties on State officials Federal authorities would give little assistance, stated, page 738:

> "Indeed, the liability of a state official, as well as the construction of his official bond, is a matter of local law as distinguished from one of general jurisprudence. *Bassinger* v. *U. S. Fidelity & Guaranty Co.* (C. C. A.) 58 F. (2d) 573, certiorari denied 287 U. S. 622, 53 S. Ct. 21, 77 L. ed. 540. Necessarily the liability of such an official will depend on state statutes, if such exist; and in the absence of statute, on the common law of the state which in large measure must be deduced from the administrative system of the state."

A great number of State decisions were cited in the brief of respondents herein in opposition to the petition for a writ of certiorari (pages 13-20), in an attempt to lay down fundamental rules with reference to the liability of sureties on official bonds. Such decisions are not authority in the instant case.

The note in 93 A. L. R. 819 emphasizes the fact that, until this Court has decided this case, the most direct authorities on the subject are those cases which consider the negligent or improper management of trust funds, particularly those having to do with deposits in banks. Beyond the amount of the depository bonds, there is no protection to bankruptcy deposits save the size and strength of the bank in which the money is deposited. The whole history of surety bonds, in so far as the Federal Government is concerned, shows an adherence

to the doctrine of strict liability for funds committed to the care of officers unless qualified by statute, and there are no cases, either in Federal or State courts, which indicate that where funds of a fiduciary are lost due to negligence, particularly where deposits of such lost funds are made pursuant to a corrupt agreement, the depositing officer and his surety can be absolved from responsibility therefor.

This is particularly illustrated in a note in 38 A. L. R. referring to loss of public funds, where the author, citing many cases, said, page 1513:

> "A majority of the courts hold that an act of the legislature designed to relieve a public officer or his surety from liability for the loss of public funds, *occurring without the fault of the officer,* is constitutional; * * *." (Italics ours.)

It thus appears that the power of the Legislature to relieve from liability for the loss of public funds is only where such loss occurs *without the fault of the officer.*

VII.

Neither the Congress of the United States nor the State Legislatures can constitutionally relieve public officials or quasi-public officials of the United States or the States from liability from the results of their negligence.

This question arises because of the opinion of the Circuit Court in the instant case stating that the mere deposit of bankruptcy funds in a designated depository was a complete exoneration of the depositing trustee or receiver without regard to his negligence or lack of good faith in making and maintaining such deposits.

There is some basis for the State or Federal Govern-

ment to grant relief to public officials and their sureties from the rigorous rule of insurance of public funds committed to their possession, in times of great stress and where no negligence or malfeasance is shown in the management of the funds of such officials, as in *Schenebeck* v. *McCrary, et al.*, 298 U. S. 36, 80 L. ed. 1031. However, there is no case where the State or Federal Government has released a public officer or his surety from liability for loss resulting from direct negligence or malfeasance in the making or maintaining of deposits of public funds when he has any power of selection between depositories. This is shown in the note in 38 A. L. R. 1513, heretofore referred to.

The power of the Congress or the Legislature to relieve an officer, if such exists, applies only to *public* funds and then only when the public officer was not at fault. In the instant case *private* funds were involved. The fault of the officer, Howard, was shown, and the bonds were conditioned upon the faithful performance of "all of his official duties" as trustee or receiver.

To deny the right to recover for loss resulting from the negligence or misconduct of the trustee or receiver herein would be a deprivation of property without due process of law in violation of the 5th Amendment to the Constitution of the United States.

In 2 Cooley on Const. Lim. (8th Ed.), it is said on page 756:

> "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away."

In *Angle* v. *Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1, 38 L. Ed. 55, it is said on page 65:

> "An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."
>
> *Muir* v. *L. & N. Ry. Co.*, 247 F. 888, 897.
>
> 12 C. J., Sec. 551, page 972.
>
> Black, Const. Law, 3rd Ed., page 602.

Every creditor in each of the 123 cases here involved was wronged by Howard's improper conduct as trustee and receiver.

VIII.

The record discloses no error in the trial which is prejudicial to the defendants, or either of them.

The opinion of the Circuit Court does not deal with the incidents of the trial. Nor did the brief of respondents in opposition to the petition for certiorari in this case discuss such incidents or the instructions of the jury, except to state that, "Petitioners have not discussed these other questions and respondents, reserving all rights, have likewise not done so." (Respondents' Brief, page 30.) In view of this statement, we desire to refer briefly to the objections that were made on the trial, and to the assignments of error. We believe, however, that because of the theory upon which the liability of Howard and his surety was established, the objections and assignments of error of the respondents are entirely without merit.

Respondents made eighty-four assignments of error,

occupying thirty-three pages of the record (R. 313-347). It is impossible to deal with them in detail in a brief of reasonable length. This Court has censured such method of assigning error as a mere encumbering of the record. (*Central Vermont Railway Co.* v. *White,* 238 U. S. 507, 59 L. Ed. 1433; *Local 167, I. B. T. etc.* v. *United States,* 291 U. S. 293, 296, 78 L. Ed. 804, 808; *Phillips, etc. Construction Co.* v. *Seymour,* 91 U. S. 646, 648, 23 L. Ed. 341.)

The defendants in the District Court received a fair trial. None of the material evidence offered and admitted on behalf of the plaintiff was disputed, nor was any evidence offered in defense or contradiction thereof. The details of the contract between Howard and the officials of the Phillip Bank (R. 163-8, 191-2, 254-9), under which the funds were transferred from the large centrally located banks into the Phillip Bank, were amplified and fully admitted by the parties thereto and the story of the runs on the bank was made definite by them. (R. 169-78, 192-6, 259-62.) Testimony as to the size, strength, financial condition and all other details regarding the Phillip Bank was suitable and necessary evidence. Howard's deposits in the bank for the various estates was admitted. (R. 72.)

Howard's defense as to the safety of the funds was that the Central Republic Bank and its predecessor, the Central Trust Company, was behind the Phillip Bank and that such bank would protect his deposits (R. 262-3), and even though such action on the part of the Central Republic Bank was legally impossible, the representations in that respect are in evidence.

The defense was not a denial of such facts or a claim that Howard was not negligent in depositing the amount of money that he did. It was that any bank named as a de-

pository was entitled to be the recipient of any amount of deposits, and that the question of the bank's weakness or the reason for the deposits in such bank was not material. In fact there was an attempt to show that the judges of the District Court were solely responsible for the funds although such funds were in the name of Howard. (R. 173, 264.)

It is not strange that the judge, when one of the bankers stated that there was a practice in this territory of loaning money on personal unsecured notes to trustees and receivers based on the amount that they might possibly receive in fees from their estates in the future, expressed himself as surprised. (R. 166-8.) This, however, was the judge's prerogative if he saw fit. It made no difference with regard to Howard's liability whether other receivers had been negligent or not or even whether the Court had fully performed its duties. Testimony as to conversations between the judge and assistant clerks of the Court, and private conversations between Howard and the judge, if he had any, were properly refused. The particular judge was not called to the witness stand, nor his deposition taken, and even that probably would not have been competent, as the proof of judicial action is the record of the Court and no record was shown proving or tending to prove that Howard had complied with the order of July 1, 1931, relative to making a report, until 1933 and such record was not competent as the bank closed in June, 1932.

The Court had the right to comment on the evidence. (14 R. C. L., Sec. 15, page 743; *Vicksburg and Meridian Railroad Company* v. *Putnam,* 118 U. S. 545, 30 L. Ed. 257, 258; *Rucker* v. *Wheeler,* 127 U. S. 85, 32 L. Ed. 102, 106; *Lovejoy* v. *U. S.,* 128 U. S. 171, 32 L. Ed. 389; *Nudd* v. *Burrows,* 91 U. S. 426, 23 L. Ed. 286; *California Ins.*

Co. v. *Union Compress Co.*, 133 U. S. 387, 33 L. Ed. 730; *Horning* v. *District of Columbia*, 254 U. S. 135, 65 L. Ed. 185.)

The charge to the jury from one standpoint was more favorable than Howard was entitled to have. The Court submitted the case on the bailee theory, and the jury was allowed to determine the question of his liability on the evidence of negligence and of the violations of his official duty. (R. 294-300.) In view of the fact that all of the money sued for was the losses of fiduciaries in excess of the depository bond, the Court might well have given a peremptory instruction. The Court properly limited the argument to the facts in evidence.

If there was no negligence or malfeasance in the conduct of Howard's office and if the occurrences which were introduced in evidence could not be construed as a breach of the official duties of Howard; if trustees and receivers in bankruptcy may, with impunity, close their eyes and deposit in banks fiduciary funds many times the amount of the depository bonds and ignore occurrences which point inevitably to the failure of the depository; if, regardless of the liability of their principals, sureties have no liability on official bonds; then the minute care with which the assignments of error were prepared, the great number of them and the objections raised are important—otherwise they are inconsequential and the points raised could have no possible effect were the case to be tried over again.

The various rules in this regard are as follows:

There was no error in the admission of evidence, but it has been frequently held that the admission of incompetent evidence to prove a fact that was fully proved by other competent evidence was not ground for reversal. (U. S. C. A., Title 28, Section 391, page 443, note 203,

and page 416, note 121, and cases cited. *Portland Gold Mining Co.* v. *Flaherty,* 111 F. 312, 319 (C. C. A. 8 C.); *St. Louis & S. F. R. Co.* v. *Duke,* 192 F. 306, 309 (C. C. A. 8. C.); *South Memphis Land Co.* v. *McLean Hardwood Lumber Co.,* 210 F. 257, 260 (C. C. A. 6 C.).)

The burden of showing prejudicial error is upon the defendant in the trial court and he is not entitled to a reversal unless it appears that he was denied some substantial right, thereby prevented from having a fair trial. (U. S. C. A. Title 28, Section 391; *Camp* v. *Gress,* 250 U. S. 308, 63 L. Ed. 997, 1004; *Fidelity & Casualty Co.* v. *Glenn,* 3 F. (2nd) 913, 918 (C. C. A. 4 C.); *Monument Pottery Co.* v. *Imperial Coal Corporation,* 21 F. (2d) 683, 685 (C. C. A. 3 C.).)

The verdict and judgment were in such form that by simple mathematical calculation the amounts of the judgment in favor of each of the separate estates could be shown. (*Parks* v. *Turner, et al.,* 12 How. 39 (53 U. S.) 13 L. Ed. 883; Vol. 4 Cyc. of Fed. Proc., Section 1463, page 1022.)

Proof of usage or custom in violation of statute, settled rules of law, or public policy, cannot be admitted in evidence. Hence, what was done by other receivers or trustees was entirely immaterial. (*Vermilye* v. *Adams Express Co.,* 21 Wall. (88 U. S.) 138, 22 L. Ed. 609, 612; *Thompson* v. *Riggs,* 5 Wall. (72 U. S.) 663, 18 L. Ed. 704, 708; *Cudahy Packing Co.* v. *Narzisenfeld,* 3 F. (2d) 567, 572 (C. C. A. 2 C.); *Rice* v. *Bakovic,* 53 F. (2d) 890 (D. C. Wash.).)

In commenting on the evidence in a charge to the jury, facts not disputed or disputable, or assumed as true by the issues made, may be assumed as true in the charge. The testimony of Howard and the two bankers introduced on his behalf was within this rule. (*Toland* v. *Sprague,*

12 Pet. 300, 9 L. Ed. 1093; *Missouri Dist. Telegraph Co.* v. *Morris & Co.*, 243 F. 481 (C. C. A. 8 C.) Cert. Den. 245 U. S. 651, 62 L. Ed. 531; *Chambers* v. *Farnham*, 236 F. 886 (C. C. A. 7 C.); *Cloquet Lumber Co.* v. *Burns*, 222 F. 857 (C. C. A. 8 C.); *U. S. Coal Co.* v. *Pinkerton*, 169 F. 536 (C. C. A. 6 C.).)

Independent evidence with respect to the possibility or probability that another bank would keep the Phillip Bank open was incompetent. (Smith-Hurd Ann. St., Ill., Chapter 38, Section 64, and Chapter 16½, Section 9; *Knass* v. *Madison and Kedzie Bank*, 354 Ill. 554, 566, 567, 188 N. E. 836, Appeal Dismissed 292 U. S. 599, 78 L. Ed. 1463.)

A lawyer in making his argument is confined to the facts that are in the record. (*Union Pac. R. Co.* v. *Field*, 137 F. 14, 17 (C. C. A. 8 C.), and cases cited. *Waldron* v. *Waldron*, 156 U. S. 361, 39 L. Ed. 453; *Graves* v. *U. S.*, 150 U. S. 118, 37 L. Ed. 1021.)

Howard was charged with notice of the condition of the bank by published statements issued by the Auditor of Public Accounts of the State of Illinois pursuant to statute. (*McCreary* v. *Schenebeck*, 191 Ark. 698, 87 S. W. (2d) 572, 574.)

It is improper for a lawyer to select a portion of a charge on a particular matter and predicate error thereon. (*Cloquet Lumber Co.* v. *Burns*, 222 F. 857, 861.)

The testimony of the defendants and their witnesses as to Howard's knowledge of the condition of the Phillip Bank constituted a judicial admission and as such is binding on them. (*Waldron* v. *Waldron*, 156 U. S. 361, 39 L. Ed. 453, 22 C. J., Sec. 370, page 330 and Sec. 505, pages 421, 422.)

CONCLUSION.

The plaintiffs submitted competent evidence in the trial court sufficient to justify the jury in finding that the defendant Howard had caused more than $225,740.45 of the plaintiffs' money to be lost because of his negligence or malfeasance as trustee and receiver in bankruptcy of said estates. They further showed that such negligence or malfeasance constituted a violation of Howard's official bonds, thereby making his surety liable to the extent of $225,740.45 of its obligation on such bonds.

The only defense seriously urged was the purely technical one that so long as Howard kept his estate moneys in a designated depository the loss of such moneys could not be chargeable to him, or his surety, regardless of his reasons for, or his negligence in, the selection and use of such depository. The fact that Howard personally had the power and duty to *select* and use one or more depositories among many destroys this defense.

It was suggested by the Circuit Court that Howard might be liable and that his surety might not be liable for such losses. It having been shown that Howard's liability arises out of his violation of his official bonds in the course of performing the duties of his office, this theory is untenable.

This Court has recently recognized some of the difficulties that have arisen in connection with bankruptcy funds that are placed in designated depositories and has adopted an order safeguarding the depository bonds. (General Order LIII.) This order and these safeguards do not meet the present situation as here the depository bond was paid and the loss is for deposits in excess thereof. If the decision of the Circuit Court is permitted to re-

main law, there is no safeguard against depositories bidding against each other by the promise of personal favors to a trustee or receiver, nor any safeguard against negligence on the part of a trustee or receiver in depositing or maintaining bankruptcy funds.

Accordingly, the Circuit Court erred in reversing the judgment of the District Court for the plaintiffs in the amount of $225,740.45, together with costs. The judgment of the Circuit Court should be reversed with suitable directions.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 30

UNITED STATES OF AMERICA, On Relation of CHESTER A. WILLOUGHBY, as Trustee in Bankruptcy of NATIONAL MECHANICAL SERVICE COMPANY, a corporation, et al.,

Petitioners,

vs.

SAM HOWARD and CONTINENTAL CASUALTY COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to The United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

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SUBJECT INDEX.

	PAGE
Subject Index	i
Table of Cases Cited	ii
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Principal Question Presented	2
Statement	3
Condition of the bank	4
The bank runs	5
Period preceding Phillip closing	6
Court supervision of the depository	7
The loans	7
Argument	8
Holding below	8
Reasons assigned for review discussed	9
Decision below upon principal question in harmony with federal and state authorities	12
Depository system in bankruptcy	16
Petitioners' brief, pp. 15-18 considered	21
Petitioners' brief, pp. 18-21 considered	24
Petitioners' brief, pp. 21-25 considered	25
Petitioners' brief, pp. 25-30 considered	29
Petitioners' brief, pp. 30-32 considered	29
Conclusion	30
Appendix	31

PAGE

Table of Cases Cited.

American Surety Co. of New York v. City of Thomasville, 73 F. (2d) 584, 586-587 (C. C. A. 5) 14
Anguera v. Yturria, 80 F. (2d) 57 (C. C. A. 5) 13
Barney v. Saunders, 57 U. S. (16 How.) 535 13
Benson v. Am. Sur. Co. of New York, (Minn.) 271 N. W. 125, 126 14
Board of County Com'rs. v. Mason, 38 Wyo. 1, 264 Pac. 93 20
Board of Education v. Nelson, 33 N. D. 462, 157 N. W. 664, 665-667 ..... 14, 16
Board of Finance v. First National Bank, 71 Ind. App. 290, 124 N. E. 768, 771-772 ..... 14, 19
Carey v. Safe Deposit & Trust Co. of Baltimore, 168 Md. 501, 178 Atl. 242 13
City of Missoula v. Dick, 76 Mont. 502, 248 Pac. 193, 195 16
City of New Haven v. Fresenius, 75 Conn. 145, 52 Atl. 823, 825 14
City of Scranton, Pa. v. Aetna Casualty & Surety Co., 11 F. Supp. 986, 988-989 (D. C. M. D. Pa.) 14, 16
In re Cobb, 112 Fed. 655 (D. C. N. C.) 18
Edwards v. Logan County, 244 Ky. 296, 50 S. W. (2d) 83 28
Gardner v. Chicago Title & Trust Co., 261 U. S. 453 20
Great Northern Railway Co. v. Weeks, 297 U. S. 135, 149 5
Harper v. Betts, 177 Ark. 977, 8 S. W. (2d) 464 13
Hart v. Savary, 114 Fla. 41, 152 So. 705 13
In re Howard, 130 Fed. 1004 (D. C. Cal.) 19
In re Hoyt et al., 119 Fed. 987, 988 (D. C. N. C.) 17, 18, 27
In re Hoyt & Mitchell, 127 Fed. 968 (D. C. N. C.) 17
Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 622 (C. C. A. 8) 17, 18

PAGE

Illinois Surety Co. v. United States, 226 Fed. 665, 667 (C. C. A. 7) 16, 18

Joint School Dist. No. 105 v. First National Bank, 125 Okla. 243, 257 Pac. 318, 319 14

Jordon v. Baker, 252 Ky. 40, 66 S. W. (2d) 84 28

In re Kohler's Estate, 15 Wash. 613, 47 Pac. 30 13

In re Kyle, 181 Fed. 617, 621 (C. C. D. Mass.) 17

Magee v. Brister, 109 Miss. 183, 68 So. 77, 78 14

McCrary v. Schenebeck, 191 Ark. 698, 87 S. W. (2d) 572 23

Mecklenburg County v. Beales, 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285 13

Miller v. Batson, 160 Miss. 642, 134 So. 567, 572 ..... 14, 20

Missoula County v. Larson, 83 Mont. 308, 271 Pac. 710, 712 16

Neff v. Harmon, 145 Okla. 114, 291 Pac. 518 13

In re Ocean City Title & Trust Co.'s. Bond, 6 F. Supp. 311 (D. C. N. J.) 19

In re Olson's Estate, 206 Ia. 706, 219 N. W. 401 13

Perkins v. State, 130 Miss. 512, 94 So. 460 20

Perley v. County of Muskegon, 32 Mich. 132, 135 14

In re Potell, 53 F. (2d) 877, 879 (D. C. N. Y.) 17, 19

Purdy v. Bank of America Nat. Trust & Savings Ass'n., 2 Cal. (2d) 298, 40 P. (2d) 481, 482 24

R. J. Reynolds Tobacco Co. v. A. B. Jones Co., 54 F. (2d) 329, 335 (C. C. A. 8) 16, 17

Schenebeck v. McCrary, 298 U. S. 36 29

In re Singer Furniture Corp., 47 F. (2d) 780, 783 (D. C. N. Y.) 17, 20

State v. Bobleter, 83 Minn. 479, 86 N. W. 461 15

State v. Bowers, 26 Oh. Cir. Ct. 326, Aff'd. 70 Oh. St. 423, 72 N. E. 1155 16

State v. Copeland, 96 Tenn. 296, 34 S. W. 427 14

State v. Gramm, 7 Wyo. 329, 52 Pac. 533, 40 L. R. A. 690 14

PAGE

State v. U. S. Fid. & Guar. Co., 210 Wis. 178, 246 N. W. 434 19

State of Kansas v. U. S. Fid. & Guar. Co., 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865 19

State v. McNamer, 62 Mont. 490, 205 Pac. 951 28

Stephens v. City of Ludlow, 159 Ky. 729, 169 S. W. 473, 475 ..... 14, 28

In re Stone's Assignment, 220 Ia. 1341, 264 N. W. 604 13

Town of Cameron v. Hicks, 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926 13

Town of Danbury v. Riedmiller, 208 Ia. 879, 226 N. W. 159 14

Town of Hamden v. American Surety Co. of New York, 9 F. Supp. 733, 738-739 (D. C. Conn.) 12, 14, 16

Town of Lakeland v. Ballmer, 209 Wis. 636, 245 N. W. 682, 683 16

United States v. Perkins, 280 Fed. 546 (C. C. A. 8) 27

In re Welch's Estate, 100 Mont. 47, 45 Pac. (2d) 681 13

Wilson v. People, 19 Colo. 199, 34 Pac. 944 14

In re Workman's Estate, 196 Ia. 1108, 196 N. W. 35 13

TEXTS.

38 American Law Reports 1512 29

Ruling Case Law, vol. 22, p. 496 25

STATUTES.

Bankruptcy Act, Section 47(a) (3), (4), (10), 11 U. S. C. A. 75 (a) (3), (4), (10) 2, 17, 18, 19

Bankruptcy Act, Section 61, 11 U. S. C. A. 101 ..... 2, 17, 19

Bankruptcy Act General Order 29, 11 U. S. C. A. 53 ..... 2, 18, 19

Judicial Code, Section 240(a), 28 U. S. C. A. 347(a) 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 905

UNITED STATES OF AMERICA, On Relation of CHESTER A. WILLOUGHBY, as Trustee in Bankruptcy of NATIONAL MECHANICAL SERVICE COMPANY, a corporation, et al.,

Petitioners,

vs.

SAM HOWARD and CONTINENTAL CASUALTY COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to The United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 87 F. (2d) 243 (R. 393).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended. 28 U. S. C. A. 347(a). The date of the judgment sought to be reviewed is January 8, 1937 (R. 393). A rehearing was denied on January 29, 1937 (R. 406).

Statutes Involved

Section 47 of the Bankruptcy Act, 11 U. S. C. A. 75(a) (3) (4), and General Order 29, 11 U. S. C. A. 53, provide with respect to the official duties of a trustee or receiver in bankruptcy, insofar as they relate to the safekeeping and handling by the officer of bankrupt estate funds coming into his possession pending disbursement or distribution, as follows: the officer must deposit the funds in one of the depositories designated by the bankruptcy court; he may make disbursements thereof only by check or draft countersigned by a judge or referee of the bankruptcy court; he must keep regular accounts thereof and file the required reports.

Section 61 of the Bankruptcy Act, 11 U. S. C. A. 101 provides that courts of bankruptcy shall designate banking institutions as depositories for the funds of bankrupt estates, shall require and approve bonds to be given by depositories to secure such deposits and may from time to time increase the amount thereof, and may change depositories.

The above provisions are set forth in the Appendix.

Principal Question Presented

Whether an official surety bond given by a trustee or receiver in bankruptcy conditioned upon the performance by the principal of his official duties covers a loss of bankrupt estate funds resulting from a closing of the designated depository in which such funds were deposited by the trustee or receiver, on the theory that although not provided by the Act or general orders, an official duty rests on such officer when making or maintaining the deposits in the depository to determine with due care the stability of the depository.

Statement

Petitioners seek certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit reversing a judgment for the petitioners in the District Court and granting the respondents a new trial (R. 402). The cause involves three suits at law, separately brought and thereafter consolidated, to enforce the alleged liability of the respondent, Howard, as trustee and receiver in bankruptcy, and the respondent, Continental Casualty Company, as surety, on certain official trustee's and receiver's bonds, for an amount of bankrupt estate funds deposited by Howard, as trustee or receiver, in the Phillip State Bank & Trust Company of Chicago, and lost at the time of its closing in 1932. The bonds were given in various bankruptcy estates of which Howard acted as trustee or receiver, and provided in substance that the respondents would pay losses which might arise from (a) a failure of Howard to obey an order of court, (b) a failure of Howard faithfully and truly to account for all moneys, assets and effects of the particular bankruptcy estate, and (c) a failure of Howard faithfully to perform "his official duties as said trustee" or receiver (R. 59-60, 65-66).

The case was tried by petitioners in the District Court, as petitioners say in their brief, p. 21, "on the theory that Howard's duty was that of exercising ordinary care as a trustee or receiver in depositing and maintaining bankruptcy funds" in the Phillip State Bank. Their complaint alleged that Howard "negligently, carelessly and improperly deposited and maintained" in the bank the funds in controversy (R. 8, Par. 11; see also R. 9, Par. 12). Petitioners assumed that a want of ordinary care by a trustee or receiver in bankruptcy in regarding the financial condition of a designated depository in which estate deposits

were made and in judging the possibility of such depository being closed, whether by a bank run or otherwise, would constitute a breach of his official bond. The District Court followed this theory and, as petitioners likewise point out, p. 25, its "instructions to the jury were based on the duty of Howard as trustee or receiver, to use the degree of care which would guide a reasonably prudent man in the conduct of his trustee responsibilities."

The Circuit Court of Appeals in the opinion below narrowed its decision to a determination of whether this theory of the legal responsibility of the respondents on the bonds was in error (R. 394, 396). The Court, therefore, for the purpose only of such determination was willing to assume a failure of Howard to regard the stability and solvency of the Phillip State Bank as a reasonably prudent person might have done under the circumstances (R. 398). [It will be noted that much of petitioners' argument on the facts erroneously takes this assumption as a concession.]

If the theory of liability upon which petitioners proceeded below and which the District Court adopted in its charge, was erroneous, the judgment of the Circuit Court of Appeals reversing the cause was sound. In this view of the case, any inaccuracy or omission of fact in the petition for certiorari is of no great significance except to the extent that it might obscure the principal question of law actually decided below and here presented. However, to correct any misimpression which might arise from petitioners' statement, reference may be made to the facts stated in the opinion below (R. 394-396) and to the following facts:

Condition of the bank

The Phillip State Bank, at the time Howard commenced making deposits there in August, 1930, had been in business on the north side of Chicago for over fifteen years

and was of good reputation (R. 286, 256). The bankruptcy court, in designating it a depository in 1930, placed no restriction whatever upon its receipt of funds, whether upon the amount of estate deposits it could receive or otherwise (R. 143). There is no proof that the depository was in an insolvent or unsound financial condition at any time prior to its closing by the run of June, 1932. The quarter-annual bank reports filed throughout the period with the state auditor showed solvency (R. 83-101, 139, see Opinion, R. 395-396). The figures mentioned by petitioners, pp. 4-5, in respect to the financial position of the depository are incomplete as a comparison with the statistical data set forth in the opinion below (R. 395-396) and the record (R. 83-101) will show. For example, the figure stated by petitioners, p. 5, as the amount of deposits "at the time said bank closed," is the figure *after* the run had occurred and withdrawals were made (R. 72).

The bank runs

The runs at the depository were all of fortuitous, external cause, occurring during the nationwide panic of 1931-1933.* They resulted from no internal condition of the bank. The April, 1931 run was precipitated by the closing of several banks on the north side within a period of five days after the Builders & Merchants Bank & Trust Company failed (R. 137, 169, 259). The June run followed the announcement of the mergers of two of the largest banks of Chicago both located in the "loop" or business area of the city, with two other "loop" banks, in an attempt to save several hundred million dollars of deposits (R. 120, 121, 171, 137, 138). All four of the merging banks were

*Judicial notice may be taken of the character of the times. *Great Northern Railway Co.* v. *Weeks*, 297 U. S. 135, 149.

bankruptcy depositories (R. 112-113). In the runs which resulted from the mergers, nine city banks, including three bankruptcy depositories, closed (R. 137, 138, 171, 112-113). The September run at the Phillip State Bank occurred when the Rogers Park National Bank, located directly across the street from it, failed in the aftermath of the closing of the so-called "Bain chain," a group of twelve banks located in different parts of the city (R. 173, 138, 195, 196).

Period preceding Phillip closing

In the fall of 1931, the Phillip State Bank was designated an "A" institution by the Chicago Clearing House Association in a general survey then made of the banking situation (R. 176). Earlier in summer it took over the Illinois State Bank of Evanston (R. 129-131). During the period from September, 1931 until the close of the depository by the run of June, 1932 there was no material change in the financial condition of the depository except for a heavier withdrawal around Christmas time (R. 177, 196, Opinion, R. 396). In the first four months of 1932, withdrawn deposits of the preceding year which had not already been redeposited (Opinion, R. 395) were returning at the rate of $100,000 per month (R. 72). In March, 1932 the bank reached its highest point of liquidity for the period, with quick assets constituting 37.54% of the amount of total deposits (R. 72).

The Phillip State Bank was closed in June, 1932 in a run which continued for several days (R. 122). The withdrawals came without warning. They were not due to any unsound condition but were caused by a neighborhood panic which followed the closing of the Devon Trust & Savings Bank, a north side bank (R. 122, 138).

Court supervision of the depository

At the time of the city-wide runs which followed the merging of the large Chicago banks in mid-1931, the bankruptcy court in the district not only requested immediate full reports of all trustees of the amount of their bankrupt estate deposits at each of the depositories, including the Phillip State, and entered the order of June 11, directing the regular filing thereafter of quarter-annual statements of such deposits, as mentioned in the opinion of the Circuit Court of Appeals (R. 395), but communicated and conferred with the president of the Phillip State Bank concerning the bond furnished by that depository for securing bankruptcy deposits (R. 173). The bond was never thereafter increased (R. 113) nor was any order entered changing the status of the depository. Howard filed the required reports (R. 204-206, 264-265, 217, 148, 153, 144, 266).

The loans

The so-called "personal" loans which the Phillip State Bank made to Howard, adverted to in petitioners' brief, pp. 3, 4, 5, 12, 15, 17, 32, were not for Howard's individual use or benefit but for the sole purpose [see opinion below (R. 396) and petitioners' brief, p. 33] of furnishing the working capital for administering the bankruptcy estates of which he was trustee or receiver, capital which was kept in a special revolving account and employed in making petty cash advances to the estates in order to meet and pay estate expenses recurring in the course of administration, such as custodian service fees, mimeographing and stenographic fees, insurance, postage, bookkeeping and inventory service fees, etc. (R. 207, 208, 223, 230, 251-252, 254, 258). Under the practice prevailing in the bankruptcy district and approved by the bankruptcy court, trustees and

receivers regularly provided the funds for the making of such advances and were allowed reimbursement therefor out of the estates upon approval of their reports by the court (R. 254, proof offered). The loans by the Phillip State Bank to Howard were usual bank loans, bearing the regular rate of interest, made upon the personal financial statement of Howard, and approved by the directors and loan committee of the bank (R. 168, 169, 174). The moneys borrowed from the two other banks referred to by petitioners, p. 3, namely, the Foreman Bank and Central Trust Company, were of like character and similarly used to meet estate expenses (R. 229-230, 258, proof offered).

Argument

With respect to the principal question presented, p. 2, *supra*, the opinion below pointed out that in bankruptcy, all discretion with respect to the safekeeping of bankrupt estate funds pending their payment or distribution was removed from the individual trustee or receiver into whose possession the funds came and was lodged instead with the bankruptcy court; that the trustee or receiver could not retain the funds in his own possession as certain public officers might do with regard to official funds nor could he, like the common law fiduciary, place them in any bank which he reasonably should choose, but, rather, was required to deposit them promptly in one of the banks designated as a depository for such funds by the bankruptcy court, and might withdraw them only when directed by the bankruptcy court, and, then, upon a check countersigned by that court; that the bankruptcy court alone investigated and determined which banks should act as depositories, determined what bond or security such depositories should furnish to secure against a loss of funds through a bank failure or other risk, and supervised the

depositories as officers of the court and determined their continuing status (R. 397-398, 399-401). The opinion further pointed out that the individual bond of a trustee or receiver was an official bond and that the undertaking in such bond assuring against loss from any failure of the officer to perform his official duties, referred to the duties stated and defined by law as pertaining to the office and not any act in which the officer might become engaged (R. 398, 399). The Circuit Court of Appeals therefore held that where suit was brought on a trustee's or receiver's bond to recover the amount of funds lost in the closing of a designated depository, on the theory that the trustee or receiver had failed in an official duty to examine, ascertain and judge with ordinary care the financial condition and stability of the bank when depositing the funds there, such action was ill-conceived. The basis of this holding is discussed more fully hereinafter, pp. 12-20.

It is submitted that the case warrants no review by this Court.

The decision below upon the principal question is not in conflict with the decision of any of the other Circuit Courts of Appeal, and no such contention is made. It conflicts with no rule of law stated in any of the applicable decisions of this Court. It is supported by the general weight of authority and reason. See opinion below (R. 401) and pp. 14-16, *infra*. No question is presented calling for the exercise by this Court of its powers over procedure below.

Nor is any issue of public importance raised. The principal issue relates to matters of detail in the deposit of bankrupt estate funds by the trustee or receiver. Petitioners have sought in their brief to lend importance to the case by suggesting that the rule announced below will

place bankrupt estate funds in jeopardy. This suggestion ignores the theory of security underlying depository systems of the kind employed for safekeeping bankrupt estate funds. Protection of such funds pending payment, administration or distribution, is sought not in any individual discretion or control over them by the fiduciary or fiscal officer into whose possession the funds come and in a correlative imposition of liability in the event of his negligent handling thereof, but in the provision for depositories and for the independent and exclusive exercise of the various administrative functions over them with which the authority that is empowered to select and supervise them is charged. It is true that so far as the trustee or receiver in bankruptcy is concerned, the system in resting these functions with the bankruptcy court has removed them from the trustee or receiver. And, equally, the surety on the trustee's or receiver's bond in the individual estates does not guarantee the performance of these functions in what would amount to an underwriting of the solvency of all the designated depositories, a risk assumed by the surety on the bonds of the individual depositories. It does not follow, however, that estate deposits are faced with catastrophe. Greater security is utimately achieved in the placing with an independent authority, investigatorial and supervisory powers over places of deposits for all estate funds in the district.

Petitioners assign, p. 8, three reasons for the granting of the writ. *First*, the Circuit Court of Appeals decided an important question of general law in a way probably untenable or in conflict with the weight of authority. It is submitted that the principal question decided below was one of federal, not general, law, that it was decided correctly and, as above stated, was not of public importance. There is no conflict with the general weight of authority,

and petitioners' assertion to that effect, p. 8, not only is unsupported but is inconsistent with a portion of their later argument, pp. 28-29. The holding which petitioners ascribe to the court in stating their first reason, p. 8, is inaccurate. *Second,* the Circuit Court of Appeals decided an important question of federal law which has not but should be settled by this Court, p. 8. Petitioners, however, do not explain in what way the question, were it important, is unsettled, nor why further pronouncement by this Court is necessary. *Third,* the Circuit Court of Appeals decided a federal question in a way probably in conflict with applicable decisions of this Court. Petitioners, however, make no reference to any such decision and none has been found. The suggestion, p. 8, that the Court of Appeals reached its decision below as a result of confusing the duties of a trustee or receiver in bankruptcy, in respect to estate funds, which petitioners assert to be private funds, and those of a public officer in respect to public funds, misapprehends the basis of the decision. The rule determinative of liability is not concerned with the source or nature of the funds, public or private, but with the presence of a depository system such as that which exists in bankruptcy, pp. 14 *et seq., infra.* Moreover, bankrupt estate funds, to be accurate, are not strictly private funds in the sense in which moneys held by a common law fiduciary or private person are, but are funds subject to administration pursuant to statutory provision.

Considerable of the argument of petitioners contained in the supporting brief reduces itself, upon analysis, to a challenge of the opinion of the Circuit Court of Appeals by differing with that Court upon facts. Petitioners repeatedly emphasize their own factual characterizations. It is believed that these matters are of no general importance and, under the usual rule, alone would afford no

basis for the issuance of the writ. Hence, only the questions of law raised by petitioners' brief, insofar as here deemed relevant, will be examined.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS UPON THE PRINCIPAL QUESTION IS IN HARMONY WITH FEDERAL AND STATE DECISIONS INVOLVING THE DUTY OF DEPOSITING OFFICERS IN DEPOSITORY SYSTEMS SIMILAR TO THAT WHICH CONTROLS IN BANKRUPTCY.

In discussing the principal question, petitioners seek to convey the impression, pp. 25-29, that there is a hopeless contrariety of opinion among state and federal authorities as to the responsibility of fiduciaries and public and quasi-public officers for funds, placed in their custody, which are deposited in some bank and thereafter lost in a bank failure. In *Town of Hamden* v. *American Surety Company,* 9 F. Supp. 733 (D. C. Conn.), this apparent confusion was explained as follows, pp. 738-739:

> "Necessarily the liability of such an official will depend on state statutes, if such exist; and in the absence of statute, on the common law of the state which in large measure must be deducted from the administrative system of the state.
>
> Indeed, this underlying principle that the liability of a state official depends upon the local law is the source of much of the confusion on the subject-matter. For the many variations in the administrative systems of the several states necessarily lead to different conclusions as to their respective policies; in some states, as in the federal government, the statutory structure of administration is such as to compel the conclusion that the common law liability of a public custodian has been impliedly modified; in others no such conclusion is justified."

The cases dealing with the liability of fiduciaries, or public or quasi-public officers, for funds placed in their custody and lost in some bank failure, divide themselves into three classes according to the rule of responsibility applied.

In the first class the rule is one of absolute liability. It is limited in application to public officers and holds them strictly liable as insurers for whatever loss may occur. Due care is immaterial. *Mecklenberg County* v. *Beales, Treasurer,* 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285; *Town of Cameron* v. *Hicks,* 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926. In none of these decisions, however, is there involved a depository system of the kind existing in bankruptcy.

In the second class the rule of ordinary care and prudence is followed. Here, the common law fiduciary or the public or quasi-public official is held liable only in the event of a failure to exercise ordinary care and prudence as to the safety of the bank when making or maintaining deposits. Common law trustees, *Barney* v. *Saunders,* 57 U. S. (16 How.) 535; *Anguera* v. *Yturria,* 80 F. (2d) 57 (C. C. A. 5); *Carey* v. *Safe Deposit & Trust Co. of Baltimore,* 168 Md. 501, 178 Atl. 242, equity receivers, *Neff* v. *Harmon,* 145 Okla. 114, 291 Pac. 518, assignees for the benefit of creditors, *In re Stone's Assignment,* 220 Ia. 1341, 264 N. W. 604, executors, *In re Kohler's Estate,* 15 Wash. 613, 47 Pac. 30; *In re Workman's Estate,* 196 Ia. 1108, 196 N. W. 35, administrators, *Hart* v. *Savary,* 114 Fla. 41, 152 So. 705; *In re Olson's Estate,* 206 Ia. 706, 219 N. W. 401; *Harper* v. *Betts,* 177 Ark. 977, 8 S. W. (2d) 464, and guardians, *In re Welch's Estate,* 100 Mont. 47, 45 Pac. (2d) 681, are held liable for estate funds lost in a closed bank only if they have failed in such duty. In this class, likewise, are found those cases of public officers in which the courts refuse to apply the strict rule and merely hold them liable

for a failure to exercise due care. *Wilson* v. *People,* 19 Colo. 199, 34 Pac. 944 (involving a clerk of court); *State* v. *Copeland,* 96 Tenn. 296, 34 S. W. 427 (town trustee); *Town of Danbury* v. *Riedmiller,* 208 Ia. 879, 226 N. W. 159 (town treasurer); *State* v. *Gramm,* 7 Wyo. 329, 52 Pac. 533, 40 L. R. A. 690 (state treasurer). As with the first class of cases, none of the above decisions concerns itself with a depository system of the kind here involved.

In the third class, the fiduciary or depositing officer is not held responsible for funds lost on deposit. *Town of Hamden* v. *American Surety Co. of New York,* 9 F. Supp. 733, 738-739, (D. C. Conn.); *City of Scranton, Pa.* v. *Aetna Casualty & Surety Co.,* 11 F. Supp. 986, 988, 989 (D. C. M. D. Pa.); *American Surety Co. of New York* v. *City of Thomasville,* 73 F. (2d) 584, 586, 587 (C. C. A. 5) cert. den. 294 U. S. 721; *Perley* v. *County of Muskegon,* 32 Mich. 132, 135; *Board of Education* v. *Nelson,* 33 N. D. 462, 157 N. W. 664, 665, 666, 667; *Benson* v. *American Surety Co. of N. Y.,* (Minn.) 271 N. W. 125, 126; *Stephens* v. *City of Ludlow,* 159 Ky. 729, 169 S. W. 473, 475; *Magee* v. *Brister,* 109 Miss. 183, 68 So. 77, 78; *Board of Finance* v. *First National Bank,* 71 Ind. App. 290, 124 N. E. 768, 771-772; *Miller* v. *Batson,* 160 Miss. 642, 134 So. 567, 572; *City of New Haven* v. *Fresenius,* 75 Conn. 145, 52 Atl. 823, 825; *Joint School District No. 105* v. *First National Bank,* 125 Okla. 243, 257 Pac. 318, 319. In each of these cases there is involved some depository system set up by statute for the administration and safekeeping of the funds pending disbursement, payment or distribution. While the systems vary in structure—depository systems not only differ among jurisdictions but in the same jurisdiction—all are characterized by what the Circuit Court of Appeals termed in its opinion below a "divided authority" over the funds while in safekeeping (R. 400). The extent of discretion and

control over funds which the officer or fiduciary in the first two classes of cases exercised is not enjoyed by the fiduciary or the depositing officer.

The principle underlying the systems is essentially that of checks and balances and involves the following features: (a) the fiduciary or officer who receives the funds and who generally is vested with all or some amount of the disbursing power may not retain the funds in his own possession during the period of safekeeping or exercise any general discretion as to the place where they are to be kept, (b) he is required to deposit the funds in a depository designated for that purpose and can make no deposits, or place the funds, elsewhere, (c) the power to select, designate and supervise such depository, to revoke its designation and designate new depositories, is lodged with a person or body other than the fiduciary or officer. The requirement that such fiduciary or officer promptly deposit the funds in a depository chosen for such purpose by the designating authority and the consequent shifting away from him of the power or discretion to select and designate the depository, form the basis upon which the courts hold that the legislative intent was to impose no liability upon the fiduciary or officer in the event of a loss through the closing of the depository. The decisions point out that where the stated features appear and his discretion is thus limited, the fiduciary or officer was not intended to be an insurer of the funds, and what an ordinary prudent person might have done with his own moneys in depositing them in the depository is wholly irrelevant. On the other hand, where some of the features are not present, as where the depositing officer is required by statute to deposit the funds in a bank but has authority to designate what bank shall act as depository, it is held that the legislative intent was not to relieve him from responsibility for loss. *State* v. *Bob-*

leter, 83 Minn. 479, 86 N. W. 461. In some jurisdictions the rule has found its way into an express statutory provision of exoneration. *State* v. *Bowers,* 26 Oh. Cir. Ct. 326, aff'd. 70 Oh. St. 423, 72 N. E. 1155. However, express statutory exoneration is unnecessary. See particularly *City of Scranton, Pa.* v. *Aetna Casualty & Surety Co., supra,* 11 F. Supp. 986, 988 (D. C. M. D. Pa.).

As a corollary to the rule of these cases, it is held that where a bond is required by law of the designated depository to secure deposits, the fiduciary or depositing officer is under no duty to inquire into the amount or sufficiency of such bond if the amount is fixed and terms approved by some one other than the fiduciary or depositing officer. *Town of Lakeland* v. *Ballmer,* 209 Wis. 636, 245 N. W. 682, 683; *Board of Education* v. *Nelson,* 33 N. D. 462, 157 N. W. 664, 667; see *City of Missoula* v. *Dick,* 76 Mont. 502, 248 Pac. 193, 195; *Illinois Surety Co.* v. *United States,* 226 Fed. 665, 667 (C. C. A. 7).

The depository system established under the bankruptcy act and general orders in bankruptcy for the safekeeping of bankrupt estate funds during administration is similar in its essential features to the federal depository system provided by the acts of Congress [see *Town of Hamden* v. *American Surety Co.,* 9 F. Supp. 733, 738 (D. C. Conn.)], and the systems involved in the above cases:

The trustee or receiver in bankruptcy and his duties with respect to estate funds coming into his possession for safekeeping. While the provisions of the Act and general orders relating to the safekeeping of bankrupt estate funds do not expressly apply to receivers, it is well settled that the duties of receivers in this respect are the same as those of trustees. *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.,* 54 F. (2d) 329, 335 (C. C. A. 8).

Trustees and receivers are depositing officers. They are required to "deposit all money received by them in one of the designated depositories." Bankruptcy Act, sec. 47 (a), (3), 11 U. S. C. A. 75 (a) (3). This duty is mandatory. *In re Potell,* 53 F. (2d) 877, 879, (D. C. N. Y.); *In re Hoyt,* 119 Fed. 987, 988 (D. C. N. C.); *In re Kyle,* 181 Fed. 617, 621 (C. C. D. Mass.); *Huttig Mfg. Co.* v. *Edwards,* 160 Fed. 619, 622-623 (C. C. A. 8); *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.,* 54 F. (2d) 329, 335 (C. C. A. 8). Thus, depositing estate funds in a bank will not save the deposit from being unlawful if the bank is not a designated depository. *In re Potell,* 53 F. (2d) 877 (D. C. N. Y.); *In re Hoyt,* 119 Fed. 987 (D. C. N. C.). Nor will an order by the district court in bankruptcy specifically directing that the deposit be made in a non-designated bank render the deposit any the less illegal. *Huttig Mfg. Co.* v. *Edwards,* 160 Fed. 619, 622 (C. C. A. 8); *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.,* 54 F. (2d) 329 (C. C. A. 8). Similarly, a disbursement by the trustee or receiver out of funds in his possession, without first depositing the funds in a designated depository and then making the disbursement, is improper. *In re Hoyt & Mitchell,* 127 Fed. 968 (D. C. N. C.); *In re Kyle,* 181 Fed. 617 (C. C. D. Mass.). On the other hand, there is no need for the trustee or receiver, before depositing in a designated depository, to secure an order directing the same. *In re Singer Furniture Corp.,* 47 F. (2d) 780, 783 (D. C. S. D. N. Y.).

The trustee or receiver is obliged to determine whether the particular banking institution in which he proposes to make deposits is a designated depository. This he can do by examining the formal order of designation required by statute. Bankruptcy Act, sec. 61, 11 U. S. C. A. 101. Where the order of designation places some restriction upon the making of deposits, as a limitation upon deposits

in excess of a stated amount, the trustee or receiver is required to observe such restriction. However, if the order is a general order, the trustee or receiver is free to make deposits without particular restraint. *Illinois Surety Co.* v. *United States,* 226 Fed. 665, 667 (C. C. A. 7); see also cases cited p. 16, *supra.*

Trustees, and consequently receivers, as depositing officers, are required within the first month after appointment to file and make every two months thereafter, reports with the district court in bankruptcy showing the amount of bankrupt estate funds on hand and what other information the court shall require. Bankruptcy Act, sec. 47 (a) (10), 11 U. S. C. A. 75 (a) (10).

Trustees and receivers are not merely depositing officers; they also make disbursements. However, their power to disburse is limited by statute and general order. Section 47 of the Act provides that disbursements may be made "only by check or draft" on the depository. 11 U. S. C. A. 75 (a) (4). General Order 29 provides that "No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk (of the court) or his assistant under an order made by the judge * * *." 11 U. S. C. A. 53. These requirements are likewise mandatory. *Huttig Mfg. Co.* v. *Edwards,* 160 Fed. 619, 622-623 (C. C. A. 8); *In re Hoyt,* 119 Fed. 987, 988 (D. C. N. C.). In some districts it is held that these provisions prevent the making of deposits in the name of the trustee or receiver as such officer, but require the deposits to be made in the name of the bankruptcy court. *In re Cobb,* 112 Fed. 655.

The bankruptcy court as the designating and administrative authority. The district court in bankruptcy has abso-

lute authority over the designation and supervision of depositories for bankrupt estate funds. Bankruptcy Act, sec. 61, 11 U. S. C. A. 101. Exclusive discretion and power are given it to select among banking institutions and designate those which are to act as depositories. No restriction is placed by the Act upon the terms which may be required as a condition to designation except that a depository bond payable to the United States shall be furnished. *Ibid.* The amount of the bond is left to the approval of the court, and it may from time to time increase the amount thereof. *Ibid.* The court has full power to change the depository and appoint new ones as the occasion may require. *Ibid.*

The court in designating and supervising depositories acts principally in an administrative rather than judicial capacity. See discussion *Board of Finance* v. *First National Bank*, 71 Ind. App. 290, 124 N. E. 768. It employs summary orders, *In re Howard*, 130 Fed. 1004 (D. C. Cal.); *In re Ocean City Title & Trust Co.'s Bond*, 6 F. Supp. 311 (D. C. N. J.); *In re Potell*, 53 F. (2d) 877 (D. C. N. Y.); requires reports from trustees, receivers and depositories, 11 U. S. C. A. 75 (a) (10), countersigns all checks drawn on depositories, 11 U. S. C. A. 53, Gen. Ord. 29; and follows a characteristically non-judicial procedure (see R. 148, 173).

The designated depository and funds in its possession. The position of the designated depository in the system sufficiently appears from what has above been stated. So far as receiving bankrupt estate funds, its conduct is controlled by the order of designation, other orders made by the bankruptcy court, and general law. It is amenable to summary order. Designated depositories are themselves officers of the court. *State of Kansas* v. *U. S, Fid. & Guar. Co.*, 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865; *State* v. *U. S. Fid. & Guar. Co.*, 210 Wis. 178, 246 N. W.

434; *Miller* v. *Batson,* 160 Miss. 642, 134 So. 567; *Perkins* v. *State,* 130 Miss. 512, 94 So. 460; *Board of County Com'rs.* v. *Mason,* 38 Wyo. 1, 264 Pac. 93. Funds deposited with the depository are withdrawn from *custodia legis* and become simple debt claims against the bank. *Gardner* v. *Chicago Title & Trust Co.,* 261 U. S. 453. The depository is responsible for any loss which may arise if it permits a receiver or trustee to withdraw bankrupt estate funds by a check that is not countersigned by the bankruptcy court. *In re Singer Furniture Corp.,* 47 F. (2d) 780 (D. C. N. Y.).

As the Circuit Court of Appeals pointed out, the depository system in bankruptcy is the same type as the federal and state systems involved in the cases above where the rule of non-responsibility was applied to the depositing officer. The removal from the trustee or receiver in bankruptcy, within the ambit of his office, of any discretion with respect to the safekeeping of estate funds in a designated depository, places him in a role different from that of the public officer who could, if he wished, put official funds in his own pocket and was held to an insurer's liability in the event they were lost in a bank failure, or the common law fiduciary making deposits in such bank as he chose and withdrawing them at will, who was held liable for a similar loss if he failed to observe ordinary care and prudence for their safety.

The decision of the Circuit Court of Appeals upon the principal question is correct, in harmony with authority and presents no case warranting review within the meaning of the rules. The opinion itself affords a careful, well-considered precedent.

II.

PETITIONERS' BRIEF, PP. 15-18 CONSIDERED.

The excerpt from the opinion quoted in petitioners' brief, p. 15, is not, as petitioners assert, a *summation* of the Circuit Court of Appeals' decision, nor is the "implication" which petitioners proceed to find in the words, nor the suppositious applications which they make thereof, indicative fairly of the holding. The Court did not treat of "apparent dangers" to funds, of "bad management" or "failing condition" of depositories, or of trustees causing depositories "to bid for such funds by the promise of fees," or "for corrupt motives." The Court determined that in an action on the official bond of the trustee or receiver no recovery could be had for bankruptcy deposits lost in a designated depository which closed, on the theory that in bankruptcy a trustee or receiver is under an official duty when making deposits of estate funds in a depository, to investigate, ascertain and judge the stability of the bank and the possibility of its closing.

Petitioners apparently contend, p. 16, that the trustee or receiver, though under a mandatory obligation to place estate funds in one of the designated depositories, nevertheless has a duty to evaluate the position of the various depositories in the district and to select among them, that he must consider such matters as the relation between the size of the depository bond of each of the various depositories and the total amount of bankruptcy deposits in all the various estates which he individually administers. And, presumably, he must ascertain and consider when making deposits, the amount of estate funds deposited and main-

tained on deposit in each of the depositories from time to time by all of the other receivers and trustees in the district. Petitioners point, p. 16, to twenty-one different banks qualified as depositories when the first deposits were made in 1930, and say that "at all times thereafter * * * there was a substantial number of such depositories."

Under the depository system in bankruptcy all depositories are in law upon an equal footing. Each is designated by the bankruptcy court and continues under its supervision; each is an officer of the court and subject to summary order. In the nature of the system no duty exists for the trustee or receiver to exercise an individual discretion as to the relative security of the depositories and, in effect, to review the judgment of the designating authority at the risk of being held liable for negligence. In the case at bar, the bankruptcy court, supervising the depositories, entered an order in June, 1931, requiring receivers to file complete reports showing the amount of estate deposits kept in the depositories and the names of the depositories (R. 145). Reports of this character were filed by Howard as trustee and receiver with the court, quarter-annually, throughout the period (R. 204-206, 264-265, 217, 148, 153). Evidence was offered of the compilation then made by that court of the aggregate sum of the estate deposits of all receivers and trustees in each depository (R. 156-158). With respect to the Phillip State Bank the bankruptcy court made particular inquiry of the depository in the middle of 1931 (R. 173). Additional or increased depository bonds were required of some of the depositories but not of the Phillip State Bank (R. 112-113).

It might be noted that of the twenty-one depositories mentioned by petitioners, five-sevenths either failed or had

been or were compelled to merge.* The period involved occurred in the midst of a general bank panic and crisis. What the relative safety was, if any, of the various depositories is not shown by the record. There is no evidence of their respective financial positions, their liquidity, the amount of estate funds on hand from time to time deposited by the various trustees and receivers, the relation to such amount of the amount of the depository bonds, etc. (R. 109, 277). Indeed, evidence of this character offered by respondents was refused (R. 277-283, 156-158).

Petitioners' contention, pp. 17-18, appears to be that because of the so-called "personal" loans made to Howard by the Phillip State Bank, Howard "prejudiced his judgment" as to that particular depository and that such matter is an element to be considered in determining whether he acted as an ordinary prudent person. This argument begs the question. It assumes the existence of a duty.

Depositories which failed: South Side Trust & Savings Bank, Washington Park National Bank (R. 138, 113), Peoples Trust & Savings Bank, South Side Bank & Trust Company, Transportation Bank of Chicago, Chicago Bank of Commerce, Cosmopolitan State Bank, Edgewater Trust & Savings Bank, Jackson Park National Bank, Woodlawn Trust & Savings Bank. As to the latter banks, see official report of Illinois State Auditor, *Statements Showing Total Resources and Liabilities of Illinois State Banks,—at the close of business June 29, 1935*, pp. 26, 28, 31, 32, of which judicial notice may be taken. *McCrary* v. *Schenebeck*, 191 Ark. 698, 87 S. W. (2d) 572, 574.

Depositories which merged: Foreman State National Bank, National Bank of the Republic, both of which were "loop" banks, Chicago Trust Company (R. 138, 201, 112-113), State Bank of Chicago and Union Trust Company (R. 112, 113; said report, p. 28).

Much is said generally by petitioners about the loans as a basis for challenging the opinion of the Circuit Court of Appeals. It will be observed that except for a brief statement at the very close of petitioners' brief, p. 33, all mention of the nature of the loans is avoided. The character of these loans has been stated, above, pp. 7-8. While they were personal in the sense that Howard individually bound himself for their repayment, they were not personal in the sense that they were made for his individual gain or advantage. The money was borrowed and used solely for the benefit of the estates which he administered and in the interest of their efficient and thrifty management. The funds were advanced to the estates and used to meet recurring petty administrative expenses in order to avoid continuous petitioning of the bankruptcy court for allowances to meet such items. This was the general practice among receivers and trustees and had the full approval of the bankruptcy court (R. 254, evidence offered).

Petitioners argue, p. 33, that Howard was under no duty to make such advances. A similar contention made in a case where common law trustees had borrowed moneys for the benefit of their estates, was dismissed by the court with the words "It is no answer to say that they could have applied to the court to borrow such funds each time the necessity arose to do so in order to carry on operations." *Purdy* v. *Bank of America Nat. Trust & Savings Ass'n.*, 2 Cal. (2d) 298, 40 Pac. (2d) 481, 482.

III.

PETITIONERS' BRIEF, PP. 18-21 CONSIDERED.

Petitioners' contentions, pp. 18-21, are not clear. The statement, p. 18, that the opinion below intimated that Howard might be personally liable, is not correct. The

Court said that the matter was one which it was "not called upon to decide" (R. 402). The assertion, p. 19, that bankrupt estate funds are private funds errs as a matter of law. Pending their deposit in a designated depository the funds are in *custodia legis*, and upon deposit they become claims against the depository subject to administration under the bankruptcy act and withdrawal upon court direction (see opinion, R. 401). The quotation, p. 19, from Ruling Case Law is the general rule that the undertaking of a surety of an official bond is co-extensive with the officer's official duties.

The cases cited by petitioners, p. 20, do not stand for the propositions stated. In each of the cases there was involved an express statutory limitation upon the amount of deposits which could be placed in the bank, and the deposits exceeded the limitation. The rule in bankruptcy, as well as the general rule, is that in the absence of an express restriction the depositing officer need not concern himself with the amount or sufficiency of the security given by the depository (see pp. 17-18, 16, *supra*).

IV.

PETITIONERS' BRIEF, PP. 21-25 CONSIDERED.

a. Howard obeyed all orders of the court.

There is no evidence whatsoever of a breach of the proviso of the bonds to secure performance by Howard of orders of the bankruptcy court. As the Circuit Court of Appeals said, "there is no evidence of a breach of condition (1). There is no proof of violation of any order of the District Court nor of any loss to an estate arising from disobedience of any court order" (R. 396). The dissenting opinion expressly states that the issue of the

case falls under the proviso dealing with "official duties" (R. 402). Petitioners' statement, p. 22, "the jury was entirely justified in believing that Howard had not made any such report" as required by the June 11, 1931 order, ignores the fact that the trial court below never submitted to the jury any issue upon a failure to report (R. 295, *et seq.*) and in effect directed a verdict contrary to petitioners' contention. Howard filed with the bankruptcy court the required reports showing both the amount and place of the deposits in the Phillip State Bank, as of June, September and December, 1931 and March, 1932 (see p. 22, *supra*). The usual trustee's and receiver's periodic reports and accounts of funds were made by Howard in each of the estates, and in fact it was so conceded (R. 144, 266).

b. Howard accounted for the estate funds.

The Circuit Court of Appeals construed the language of the proviso of the bonds assuring that Howard would account, as follows: "This language imposes upon the trustee the duty to make honest and correct reports or accountings of estate funds as required by law, and to dispose of the funds so reported or accounted for in accordance with the law" (R. 397). As above stated and as the Court below said, "there is no proof that Howard failed to make or render reports or accounts according to law" (R. 397). With respect to the disposition of the funds in accordance with law, the Court pointed out that the cause involves no charge such as defalcation, embezzlement or other improper distribution of funds and that the sole question which might arise under this proviso would relate to whether an official duty existed in a trustee or receiver to judge, with care, the stability of a designated depository in which estate funds were deposited (R. 397).

This question has already been considered above and requires no further discussion.

The suggestion, p. 23, that the loss to the estates might have occurred because of a delay in distribution to creditors, apparently finds its source in a similar suggestion contained in the dissenting opinion (R. 403). There is nothing in the record concerning any delay in the regular administration and progress of any of the estates involved, let alone in which one of the estates such alleged delay occurred. The complaint did not so aver (R. 2, *et seq.*); no evidence thereof was ever offered; the trial court did not so charge (R. 294, *et seq.*); and petitioners never so contended, whether in the District Court or in the Circuit Court of Appeals.

c. Howard performed his official duties.

Petitioners' contentions, pp. 23-25, have in the main been considered in the discussion above upon the principal question presented, pp. 12-20, *supra*. Part of petitioners' argument, p. 23, refers confusedly to depository bonds, that is, bonds given by the depository itself and whose coverage of course assures against loss through insolvency or bank failure. The case at bar, however, is concerned with the personal bond of the trustee or receiver given in each individual estate to secure performance of the official duties of the trustee or receiver. The cases cited by petitioners, pp. 23-25, do not decide the question presented. *United States* v. *Perkins*, 280 Fed. 546 (C. C. A. 8) held that a sale by a trustee of estate property with the wrongful intent and purpose of paying a prior lien claimant whose claim had already been paid in order to defeat a subsequent lien-holder, was a breach of a trustee's bond. *In re Hoyt, et al.*, 119 Fed. 987 (D. C. N. C.) held that a trustee could not properly make disbursements of bank-

rupt estate funds without first depositing them and then making the disbursements upon order and counter-signed check. *Jordon* v. *Baker,* 252 Ky. 40, 66 S. W. (2d) 84, held that mandamus would lie to compel the issuance of a quietus to a fiscal officer who had deposited county funds in a designated depository which failed, and that decisions applying the insurers' rule would not be followed. By way of *dictum,* it was suggested that knowledge in the officer warranting him taking action with respect to deposits might amount to "that degree of negligence" imposing a bailee's liability. Three months after the *Jordan* case was decided, the Kentucky legislature enacted into legislation the general rule of non-responsibility which the court in the earlier case of *Stephens* v. *City of Ludlow,* 159 Ky. 729, 169 S. W. 473, had announced. Ky. Acts 1934, c. 22. See p. 14, *supra. Edwards* v. *Logan County,* 244 Ky. 296, 50 S. W. (2d) 83, was concerned with a judgment below based upon the insurer's liability rule. The case was reversed for new trial, the court pointing out that when the bank was designated a depository and the officer was directed to deposit the funds there and he obeyed, the designating authority "assumed responsibility for the integrity and solvency of the institution and exonerated him from loss of funds if suffered solely on that account." *Ibid.* 50 S. W. (2d) p. 86. *State* v. *McNamer,* 62 Mont. 490, 205 Pac. 951, held that where the county collector was under duty to pay over city funds to the city treasurer as promptly as they were computed but failed to do so, and instead permitted them to remain on deposit in a designated depository, liability for such failure might be imposed. Other cases and arguments of petitioners cited pp. 24-25, require no comment.

The statement, p. 25, that "the violation of duties, above set forth, were all admitted with the exception of the fail-

ure to make reports of total deposits'' is untrue. Respondents have maintained throughout that even if the duty assumed by petitioners existed, no violation in fact occurred. Considerable argument was had in the Circuit Court of Appeals on this question but was not considered by the Court because the supposed duty, as a matter of law, did not exist (Opinion, R. 398, 402).

V.

PETITIONERS' BRIEF, PP. 25-30 CONSIDERED.

The contention of petitioners' brief, pp. 25-30, has been considered in what has been said above.

VI.

PETITIONERS' BRIEF, PP. 30-32, CONSIDERED.

It is self-evident that no constitutional issue is here presented. Indeed, the constitutional question which petitioners urge, p. 31, is raised for the first time in their petition for certiorari. The proposition that petitioners are being deprived under the decision below of their right to recover for negligence, and hence of their constitutional guarantee, errs among many reasons in its assumption of the supposed official duty. The cases in the note in 38 A. L. R. 1512, to which petitioners refer, are inapplicable. *cf. Schenebeck* v. *McCrary*, 298 U. S. 36.

Conclusion

Respondents presented in the Circuit Court of Appeals several additional grounds for a reversal of the judgment of the District Court (R. 313, *et seq.*). Error was assigned as to the admission and exclusion of certain evidence (R. 313-324), to the giving of certain instructions to the jury (R. 329-346), etc. The Circuit Court of Appeals in granting a new trial, stated that "the discussion of other features is unnecessary" (R. 402). The assignment of these errors below, to which reference is respectfully made, sets out separately and particularly each of the errors and the specific ground for review. Petitioners have not discussed these other questions and respondents, reserving all rights, have likewise not done so.

It is respectfully submitted that the cause warrants no review by this Court and, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Section 47 of the Bankruptcy Act, 11 U. S. C. A. 75:

"(a) Trustees shall respectively * * * (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited * * *."

General Order XXIX, 11 U. S. C. A. 53:

"No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by a judge of the court, or by a refereee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn * * *."

Section 61 of the Bankruptcy Act, 11 U. S. C. A. 101:

"Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 30

UNITED STATES OF AMERICA, ON RELATION OF CHESTER A. WILLOUGHBY, AS TRUSTEE IN BANKRUPTCY OF NATIONAL MECHANICAL SERVICE COMPANY, A CORPORATION, ET AL.,

Petitioners,

vs.

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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TABLE OF CONTENTS.

	PAGE
Opinion below	1
Jurisdiction	2
Statement of the case	2
Deposit of bankruptcy funds in the Phillip State and borrowings for the benefit of the estates	3
Condition of Phillip State and the bank runs, August 1930—June, 1931	8
Activity of the bankruptcy court in June, 1931 in supervising the depositories	10
July, 1931—June, 1932	13
Closing of Phillip State	16
Other bankruptcy depositories in Chicago	16
The case as submitted to the jury	18
Summary of argument	21
Argument	23
The express conditions of the trustees' and receivers' bonds were never broken	23
The case involves no failure of Howard to obey any order of the bankruptcy court	23
There was no breach of the condition of the bonds requiring Howard to account	25
The condition assuring Howard's performance of his official duties as trustee or receiver in bankruptcy was never violated	29

PAGE

Under the depository system established by the Bankruptcy Act for assuring the safety of bankruptcy funds coming into the possession of trustees and receivers, no duty is owed by the trustee or receiver when making or maintaining deposits of funds in a designated depository of the bankruptcy court, to determine with care the condition or stability of the depository 36

Responsibility of fiduciaries and public or quasi-public officers for funds placed in their custody and lost in a bank failure 37

The depository system in bankruptcy 40

The trustee or receiver in bankruptcy and his duties with respect to funds coming into his possession for safekeeping..... 41

The bankruptcy court as the designating and administrative authority 46

The designating depository and funds in its possession 47

A fiduciary or public or quasi-public officer who deposits funds under a depository system, is not liable for their loss through a closing of the designated depository 48

Policy of the rule in bankruptcy 61

The rule of non-responsibility is not affected by the number of banks qualified as depositories in the district, assuming such questions were before this Court; nor does the rule present any issue under the Fifth Amendment 63

No question of fraud, corruption, malfeasance or bad faith is presented for review 68

PAGE

The risk covered by the bonds did not contemplate the solvency of any designated depository in which a trustee or receiver may have deposited bankruptcy funds 73

If it be assumed that a trustee or receiver in bankruptcy, in making or maintaining deposits of bankruptcy funds in a designated depository, owes a duty of care to guard against loss through a closing of the depository, nevertheless, in this case under the facts proved and what matters this court may judicially notice, Howard violated no such duty 75

Condition of the bank 76

Materiality of the proof of loans on whether the supposed duty of care arose and was discharged 96

If the case on the record was one for a jury to decide, nevertheless, the judgment in the District Court was properly reversed and the cause remanded for a new trial, for the reason that reversible error was committed in the District Court's rulings upon the admission and exclusion of evidence, in remarks of the court during the trial, in restrictions placed upon argument of counsel for respondents, in instructions given to the jury, in refusal to instruct as requested by respondents, and in the forms of verdict submitted 100

The number of assignments of error in the case at bar was necessary in order to preserve the errors committed below 101

Erroneous admissions of evidence 102

Testimony of petitioners' witnesses with respect to seeing runs, hearing rumors of insolvency and of making personal withdrawals of money 102

PAGE

Loans made by Phillip State Bank to Howard 103

Statistical data showing comparison per month between estate deposits at the Phillip State and various assets and liabilities of bank 104

Existence of other bankruptcy depositories during the period reviewed 105

Erroneous exclusions of evidence 105

Purpose for which Howard borrowed money from Phillip State Bank and practice of trustees and receivers in bankruptcy with regard to making advances to estates out of their personal funds 105

Amount of bankruptcy funds deposited by receivers and trustees in depositories other than the Phillip State during the period under review 108

The reason for the closing of the Phillip State 109

Inquiry made in early June, 1931, by the designating authority into the general banking situation then prevailing and the amount of the bonds of the depositories in bankruptcy; the telephone request made of all trustees and receivers to file with the authority a report of bankruptcy funds in the depositories and Howard's report of June 9, 1931, with respect thereto; the exercise of administrative functions by the court thereafter 111

Improper remarks of the court during trial 115

PAGE

Improper restrictions placed by the trial court upon the argument of counsel for respondents to the jury 115

Improper instructions to the jury 116

Reversible error was committed by the District Court in instructing the jury that it could not consider occurrences outside the proof in the case although such occurrences were matters of common knowledge 116

Reversible error was committed in the comments of the court on the matter of the loans made by the Phillip State to Howard 117

Reversible error was committed in instructing the jury to disregard the relationship between the Central Trust and the Phillip State in determining whether an ordinary prudent person would have made deposits in the Phillip State during the period under review.... 118

Reversible error was committed in presenting the case to the jury in a one-sided way 119

Reversible error was committed in directing the jury upon what conditions they were to find for the defendant..... 119

Reversible error was committed in refusals of requests of respondents to instruct the jury 120

Conclusion 121

PAGE

Table of Cases Cited.

A

American Surety Co. of New York v. City of Thomasville, 73 F. (2d) 584 (C. C. A. 5) 52
Anderson v. Peterson State Bank, 191 Minn. 404, 254 N. W. 459 61
Anguera v. Yturria, 80 F. (2d) 57 (C. C. A. 5) 38

B

Barney v. Saunders, 57 U. S. (16 How.) 535 ..... 38, 87
Benson v. American Surety Co. of N. Y., (Minn. 1937) 271 N. W. 125, 126 56
Bingaman v. Commonwealth Trust Co., 1 F. (2d) 505, 506, (D. C. Pa.) 41
Board of Commissioners v. Elmund, 94 Minn. 196, 102 N. W. 719, 720 89
Board of Comrs. v. Soucek, 128 Okla. 151, 261 Pac. 947 61
Board of County Com'rs v. Mason, 38 Wyo. 1, 264 Pac. 93 47
Board of Education v. Nelson, 33 N. D. 462, 157 N. W. 664 ..... 54, 60, 89
Board of Finance v. First National Bank, 71 Ind. App. 290, 124 N. E. 768 ..... 46, 58, 114
Brennan v. Eubank, (Tex. Civ. App.) 56 S. W. (2d) 513, 515 ..... 79, 116

C

Campbell v. American Bonding Company, 172 Ala. 458, 55 So. 306 31
Carey v. Safe Deposit & Trust Co. of Baltimore, 168 Md. 501, 178 Atl. 242 ..... 38, 88, 116

PAGE

C

Cheyenne v. Maryland Casualty Co., 13 F. (2d) 401 (D. C. Wyo.) 61
City of Billings v. Mass. Bonding & Ins. Co., 88 Mont. 91, 290 Pac. 246 60
City of Missoula v. Dick, 76 Mont. 502, 248 Pac. 193, 195 60
City of New Haven v. Fresenius, 75 Conn. 145, 52 Atl. 823, 825 58
City of Newburgh v. Dickey, 150 N. Y. S. 175, 178, 164 App. Div. 791 ..... 34, 58
City of Parsons v. Fidelity & Deposit Co., 29 F. (2d) 417, (D. C. Kan.) reversed on other grounds 43 F. (2d) 315 (C. C. A. 10) 31, 45, 47
City of Salisbury v. Lyerly, 208 N. C. 386, 180 S. E. 701, 703 30
City of Scranton, Pa. v. Aetna Casualty & Surety Co., 11 F. Supp. 986 (D. C. Pa.) 50, 59
City of Wilkes Barre v. Rockafellow, 171 Pa. St. 177, 33 Atl. 269, 270, 50 Am. St. Rep. 795, 30 L. R. A. 393 ..... 30, 32
Clemons v. Dennis, (Va.) 181 S. E. 387 88
In re Cobb, 112 Fed. 655 (D. C. N. C.) 45
County of Marshall v. Bakke, 182 Minn. 10, 234 N. W. 1, 4 89

D

Dewey v. Des Moines, 173 U. S. 193 69
District of Columbia v. Petty, 229 U. S. 593 30

E

Edwards v. Logan County, 244 Ky. 296, 50 S. W. (2d) 59, 83
In re John A. Etheridge Furniture Co., 92 Fed. 329 (D. C. Ky.) 24

PAGE

G

Gardner v. Chicago Title & Trust Co., 261 U. S. 453....44, 47
Germanic, The, 196 U. S. 589, 596 98
Great Northern Railway Co. v. Weeks, 297 U. S. 135, 149 .....76, 116
Gross v. Butler, 48 Ga. App. 750, 173 S. E. 866 88

H

Hale County, Texas v. American Indemnity Co., 63 F. (2d) 275 (C. C. A. 5) 27
Harper v. Betts, 177 Ark. 977, 8 S. W. (2d) 464.....38, 87
Hart v. Savary, 114 Fla. 41, 152 So. 705 .....38, 88
Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 422, 444 116
In re Howard, 130 Fed. 1004 (D. C. Cal.) 46
In re Hoyt, 119 Fed. 987, 988, (D. C. N. C.) 42, 45
In re Hoyt v. Mitchell, 127 Fed. 968 (D. C. N. C.)....27, 43, 45
Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 622-623 (C. C. A. 8) 42, 45

I

Illinois Surety Co. v. United States, 226 Fed. 665, 667 (C. C. A. 7) 43, 60
Imperial Assurance Co. v. Livingston, 49 F. (2d) 745, 748, 749 (C. C. A. 8) 41, 44

J

Joint School District No. 105 v. First National Bank, 125 Okla. 243, 257 Pac. 318, 319 58
Jordon v. Baker, 252 Ky. 40, 66 S. W. (2d) 84 59

K

In re Kohler's Estate, 15 Wash. 613, 47 Pac. 30 .....38, 88
In re Kruger's Estate, 141 Misc. 475, 252 N. Y. Supp. 688 88
In re Kyle, 181 Fed. 617, 621 (C. C. Mass.) 42, 43,45

PAGE

L

Local 167, I B. T. v. United States, 291 U. S. 293, 296.... 101
Lowe v. City of Guthrie, 4 Okla. 287, 44 Pac. 198, 200-201 30

M

Magee v. Bristow, 109 Miss. 183, 68 So. 77, 78 57
Mass. Bonding & Ins. Co. v. Steele, 125 Neb. 7, 248 N. W. 648 61
McCrary v. Schenebeck, 191 Ark. 698, 87 S. W. (2d) 572, 574 ..... 17, 66
Mecklenberg County v. Beales, 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285 37
Meehan v. King, 54 F. (2d) 761, 763 (C. C. A. 1) 41
Miller v. Batson, 160 Miss. 642, 134 So. 567 ..... 47, 58
In re Mullen's Estate, 97 Mont. 144, 33 Pac. (2d) 270 88

N

Neff v. Harmon, 145 Okla. 114, 291 Pac. 518 ..... 38, 88

O

In re Ocean City Title & Trust Co.'s Bond, 6 F. Supp. 311 (D. C. N. J.) 43, 44, 46
In re Olson's Estate, 206 Ia. 706, 219 N. W. 401 ..... 38, 88
Orton v. City of Lincoln, 156 Ill. 499, 41 N. E. 159 30

P

In re Perelstine, 44 F. (2d) 62 (D. C. Pa.) 27
Perkins v. State, 130 Miss. 512, 94 So. 460 47
Perley v. County of Muskegon, 32 Mich. 132, 135..... 53
In re Potell, 53 F. (2d) 877, 879 (D. C. N. Y.)..... 42, 46
Potter v. Fidelity & Deposit Co., 101 Miss. 823, 58 So. 713, 715 ..... 45, 47

PAGE

P

Prudential Ins. Co. v. Hart, 205 Ia. 801, 218 N. W. 529 88
Purdy v. Bank of America, 2 Cal. (2d) 298, 40 Pac. (2d) 481, 482 72

R

R. J. Reynolds Tobacco Co. v. A. B. Jones Co., 54 F. (2d) 329 (C. C. A. 8) 27, 32, 42
Roberts County v. Wickard, 53 S. D. 511, 221 N. W. 246 61
Rosebud County v. Smith, 92 Mont. 75, 9 Pac. (2d) 1071, 1073 89

S

In re Singer Furniture Corp., 47 F. (2d) 780, 783 (D. C. N. Y.) 43, 48
State v. Bobleter, 83 Minn. 479, 86 N. W. 461 40
State v. Bowers, 26 Oh. Cir. Ct. 326, aff'd. 70 Oh. St. 423, 72 N. E. 1155 ..... 33, 59
State v. Carney, 208 Ia. 133, 217 N. W. 472 61
State v. Copeland, 96 Tenn. 296, 34 S. W. 427, 434 38, 85, 95
State v. Gramm, 7 Wyo. 329, 52 Pac. 533, 40 L. R. A. 690 38
State of Kansas v. U. S. Fed. & Guar. Co., 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865 47
State v. Krause, 186 Wis. 59, 202 N. W. 319, 322-323 90
State v. McNamer, 62 Mont. 490, 205 Pac. 951 ..... 59, 60
State v. U. S. Fed. & Guar. Co., 210 Wis. 178, 246 N. W. 434 ..... 47, 61
In re State Treasurer's Settlement, 51 Neb. 116, 70 N. W. 532, 537 47
Stephens v. City of Ludlow, 159 Ky. 729, 169 N. W. 473, 475 ..... 57, 59
In re Stone's Assignment, 220 Ia. 1341, 264 N. W. 604 38, 82

PAGE

T

Thunder Hawk School District, No. 8 v. Western Surety Co., 58 S. Dak. 312, 235 N. W. 921 78
Town of Cameron v. Hicks, 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926 37
Town of Danbury v. Riedmiller, 208 Ia. 879, 226 N. W. 159 ..... 38, 88
Town of Hamden v. American Surety Company of New York, 9 F. Supp. 733 (D. C. Conn.) 48, 50
Town of Lakeland v. Ballmer, 209 Wis. 636, 245 N. W. 682, 683 60

U

United States v. Rehwald, et al., 44 F. (2d) 663 (D. C. Cal.) 27
United States v. Union Sur. & Guar. Co., 118 Fed. 482, 486 (D. C. N. Y.) 41

V

Virginia Ry. v. Mullens, 271 U. S. 220 69

W

In re Walker Grain Co., 3 F. (2d) 872, 874 (C. C. A. 5) 24
In re Welch's Estate, 100 Mont. 47, 45 Pac. (2d) 681 ..... 38, 88
Wilson v. People, 19 Colo. 199, 34 Pac. 944 ..... 38, 88
In re Workman's Estate, 196 Ia. 1108, 196 N. W. 35 ..... 38, 88

PAGE

STATUTES.

Bankruptcy Act, Sec. 33 (11 U. S. C. A. 61) 41
Bankruptcy Act, Sec. 39(a) (11 U. S. C. A. 67(a)) 28
Bankruptcy Act, Sec. 47(a)(3) (11 U. S. C. A. 75(a)(3)) 27, 31, 42, 92
Bankruptcy Act, Sec. 47(a)(4) (11 U. S. C. A. 75(a)(4)) 31, 45
Bankruptcy Act, Sec. 47(a)(5) (11 U. S. C. A. 75(a)(5)) 31
Bankruptcy Act, Sec. 47(a)(6) (11 U. S. C. A. 75(a)(6)) 31
Bankruptcy Act, Sec. 47(a)(7) (11 U. S. C. A. 75(a)(7)) 31
Bankruptcy Act, Sec. 47(a)(8) (11 U. S. C. A. 75(a)(8)) 31
Bankruptcy Act, Sec. 47(a)(9) (11 U. S. C. A. 75(a)(9)) 28
Bankruptcy Act, Sec. 47(a)(10) (11 U. S. C. A. 75(a)(10)) 32, 44, 46
Bankruptcy Act, Sec. 48 41
Bankruptcy Act, Sec. 50(b) (11 U. S. C. A. 78(b)) 24
Bankruptcy Act, Sec. 50(c) (11 U. S. C. A. 78(c)) 74
Bankruptcy Act, Sec. 50(h) (11 U. S. C. A. 78(h)) 46
Bankruptcy Act, Sec. 61 (11 U. S. C. A. 101) 31, 43, 46, 64
Bankruptcy Act, Sec. 65(a)(b) (11 U. S. C. A. 105(a)(b)) 28

General Order 29 (11 U. S. C. A. 53) 32, 45, 47
General Order 40 (11 U. S. C. A. 53) 41

PAGE

General Order 53 (11 U. S. C. A. 53) 46

General Orders & Forms in Bankruptcy No. 25 (11 U. S. C. A. 53) 24

Judicial Code, Sec. 240(a) (28 U. S. C. A. 347(a)) 2

Ky. Acts, 1934, c. 22 59

12 U. S. C. A. 90 49

31 U. S. C. A. 153 49

TEXTS.

Vol. 1, C. J. 596, Sec. 1 25

38 American Law Reports 1512 68

Duncan & Reilley, *Bankruptcy In Canada*, 2d ed., p. 373 48

A. S. Woodman, *A treatise in the Law of Trustees in Bankruptcy*, 1909, p. 51, Sec. 35(a) 42, 47

Williams Bankruptcy Practice, 14 ed. p. 395 48

2 Cooley on Const. Law (8th ed.) p. 756 68

Wigmore, *Evidence*, 2d ed. Vol. III, Sec. 1801 116

REPORTS.

Statement Showing Total Resources and Liabiilties of Illinois State Banks—*at the close of business June 29, 1935*—compiled by Edward J. Barrett, Auditor of Public Accounts for the State of Illinois, pp. 26, 28, 31, 32 ..... 17, 66

IN THE

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OCTOBER TERM, 1937

No. 30

UNITED STATES OF AMERICA, ON RELATION OF CHESTER A. WILLOUGHBY, AS TRUSTEE IN BANKRUPTCY OF NATIONAL MECHANICAL SERVICE COMPANY, A CORPORATION, ET AL.,

Petitioners,

vs.

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 87 F. (2d) 243 (R. 393). The District Court delivered no opinion.

JURISDICTION.

The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A. 347(a). The judgment of the Circuit Court of Appeals was rendered January 8, 1937 (R. 393) and a rehearing in that court was denied January 29, 1937 (R. 406). This Court granted a review on writ of certiorari May 24, 1937.

STATEMENT OF THE CASE.

Three separate suits at law were instituted in the United States District Court for the Northern District of Illinois, Eastern Division, on the relation of the petitioner Chester A. Willoughby, acting as successor trustee in bankruptcy of one hundred and fourteen estates and as successor receiver in bankruptcy of nine other estates, to enforce the alleged contractual liability of the respondents Sam Howard and the Continental Casualty Company, principal obligor and surety respectively, on one hundred and twenty-three official bonds given by Howard as predecessor trustee and receiver of the estates. A recovery was sought on the bond of each estate for an amount of funds belonging to such estate, deposited by Howard in the Phillip State Bank and Trust Company of Chicago and lost when that depository closed in 1932. The actions proceeded upon the theory that the making of deposits, and the maintenance on deposit, of bankruptcy funds in the bank under the circumstances of the case constituted a breach of the condition of each bond (R. 2-10). The three suits were consolidated for trial and heard together in the District Court, and a verdict and judgment in each was rendered for petitioners (R. 51-59, 383-386). Respondents thereafter perfected an appeal to the Circuit Court of Appeals for the Seventh

Circuit and that court, with one judge dissenting, reversed the judgments below and ordered a new trial (R. 405-406, 393). Petitioners then sought review on certiorari in this Court of the judgment of the Circuit Court of Appeals.

Each of the bonds sued upon recited Howard's appointment as trustee or receiver of the particular estate in which the bond was given and provided in substance that the respondents would pay any loss which might be sustained by the estate from (a) a failure of Howard to obey an order of court, (b) a failure of Howard faithfully and truly to account for all moneys, assets and effects of the estate, and (c) a failure of Howard faithfully to perform "his official duties as said trustee" or receiver (R. 59-60, 65-66).

DEPOSIT OF BANKRUPTCY FUNDS IN THE PHILLIP STATE AND BORROWINGS FOR THE BENEFIT OF THE ESTATES.

For the past ten years, Sam Howard has been receiver and trustee of numerous bankrupt estates pending in the District Court for the Northern District of Illinois (R. 253). Prior to the middle of 1930, bankruptcy funds were kept by Howard on deposit in the Central Trust Company of Illinois and in the Foreman State National Bank of Chicago (R. 164, 257-258, 275). Howard was indebted to the Central Trust for $2,500 and to the Foreman Bank for $7,500 (R. 223-230, 258). [Proof offered at the trial by respondents but refused by the District Court on grounds of immateriality, showed that these amounts had been borrowed by Howard on his own credit for the benefit solely of the estates in order to furnish them with cash needed for the payment of services rendered by various persons to the estates (R. 229-230, 258-259). Further proof, also offered and refused, showed that advances

of this nature were regularly repaid Howard out of the funds in the estates upon order of the bankruptcy court at the time it approved his trustee's and receiver's reports (R. 209-215, 229, 254). The trial court further refused to permit respondents to show that under a well known and uniform practice prevailing in the Northern District of Illinois and approved by the bankruptcy court in that district, receivers and trustees in bankruptcy advanced to their estates the moneys required to meet and pay estate expenses for which they received reimbursement out of the estates upon approval of their accounts by the court (R. 254, 208). Error on these rulings was assigned in the Circuit Court of Appeals but was not considered by that court in view of the decision which it reached (R. 326, 402).]

Prior to July, 1930, and over a period of many years, Howard conducted the banking business of his estates, at the Central Trust, with Clarence A. Beutel, one of its vice-presidents (R. 255, 163, 164). In late July, 1930, Beutel, in visiting Howard, stated that at the suggestion of the Central Trust he had recently become president of the Phillip State Bank & Trust Company of Chicago, and asked Howard if he would make deposits of bankruptcy funds at that bank (R. 255, 163, 164). The Phillip State was one of the well known banks located on the "north side" of Chicago and had been established for over fifteen years (R. 286, 256). Beutel explained that the Central Trust held in pledge a substantial amount of the stock of the Phillip State and was interested in its future (R. 255-256, 165, 191). Howard stated that he knew the Phillip State well as he himself lived on the north side and that he would consider making deposits there (R. 255-256). Howard inquired whether the bank granted the same loan accommodations which had

been extended at the Central Trust and other banks, loans used in making advances to bankrupt estates for the purpose of meeting expenses arising in the course of administration (R. 164, 257). Beutel replied that he was well acquainted with loans of that type and that the Phillip State made them (R. 165-166, 256). Later, in August 1930, Howard told Beutel that he had considered favorably making deposits at the Phillip State (R. 165). Beutel suggested that the bank could take over the outstanding loans at the Foreman Bank and the Central Trust if Howard furnished a satisfactory financial statement (R. 165, 257-258, 192).

On August 6, 1930 the Phillip State Bank, upon receiving Howard's financial statement, loaned Howard $5,000 at the current rate of interest (R. 223, 77). The statement showed real estate and some fifteen or sixteen thousand dollars owed him on account of advances to, and estimated earnings by way of commissions in, various bankrupt estates administered by him (R. 258, 168). Howard used $2,500 of this loan to pay the Central Trust obligation (R. 223-229, 258). On August 19, 1930, he made a second loan for $6,000 and used the money borrowed together with other funds to pay the $7,500 owed the Foreman Bank (R. 223, 77, 229, 258).

On August 25, 1930, Howard began depositing bankrupt estate funds at the Phillip State (R. 73). Before making the deposit, he examined the records in the office of the clerk of the District Court and ascertained that the Phillip State was a duly designated depository of the bankruptcy court for the deposit of bankrupt estate funds and that a depository bond approved by the court had been filed (R. 259). The order of designation placed no restriction whatever upon the bank's receipt of funds, neither by way of limitation on amount nor otherwise (R.

143). In that month Howard opened thirty-three estate accounts at the Phillip State and deposited in them, in the aggregate, $249,968.15 (R. 73). Only nine of these accounts are among those included in the present suit (R. 73).

About the same time, Howard opened with the bank two commercial accounts, known respectively as the "Sam Howard Account" and the "Sam Howard Special Account" (R. 74-76, 223). The first was an office account used to meet expenses incurred in the various bankrupt estates (R. 223, 230). In it were deposited all moneys paid Howard upon order of the bankruptcy court as reimbursement for personal advances made to the estates in paying estate expenses, and likewise the money borrowed from the Phillip State as hereinafter stated (R. 223). The Special Account was used as a deposit account for commissions allowed Howard by the court for his services in administering the estates (R. 223). When the general office account would become low, funds from the Special Account would be transferred to it (R. 230). Between September and December 1930, Howard kept from one to two thousand dollars in both of these accounts (R. 74). For the first six months of 1931 the amount ranged between three and four thousand dollars; for the last six months of that year between six and eight thousand, and from then until the close of the bank in June, 1932, likewise between six and eight thousand (R. 74). When the bank closed, Howard had on deposit in the two accounts $5,853.63 (R. 74).

In addition to the two loans made to Howard by the Phillip State in August 1930, four later loans were made. In September 1930, he borrowed $2,500, in February 1931, $1,500, in the following May, $2,500 and in July 1931, $1,015 (R. 77-78, 115). All of these loans were

time loans with interest at rates varying from 4½% to 6% per annum, were approved by the directors and loan committee of the bank and made upon Howard's personal financial statement (R. 77-78, 168-169, 258). With the exception of the loan for $1,015 which was repaid, each of the five remaining loans was extended, and at the close of the bank the total amount of these loans, $17,500, was outstanding (R. 77-78). Loans of this kind had the regular approval of the Chicago Clearing House Association (R. 174). [The trial court, after admitting over objection of respondents proof of these loans, refused to permit respondents to show that, as with the Central Trust and Foreman Bank loans, the amounts borrowed were not for Howard's individual use or gain but wholly for the benefit of the estates which he administered, to be kept in the special revolving account above mentioned and employed in making petty cash advances to these estates in order to pay estate expenses recurring in the course of administration, such as insurance, mimeographing and stenographic fees, bookkeeping, custodian and inventory service fees, etc. (R. 207, 208, 223, 230, 251-252, 254, 258). The trial court further refused proof that in 1930, 1931 and 1932 Howard made such advances in a substantial amount to all of the estates which he administered and that he advanced to the estates involved in these suits alone over $12,000, for which he has never been repaid (R. 206-207). Error was assigned in the Circuit Court of Appeals on the refusal of the trial court to admit the foregoing proof but was not considered in view of the court's decision (R. 324, 325-326).]

From August 1930 continuously until the close of the bank, the Phillip State served as depository for funds belonging to bankrupt estates administered by Howard. The aggregate of some $250,000 of bankruptcy funds there

deposited by Howard in the thirty-three estates in August 1930 as heretofore stated, was increased during the next three months by deposits in those and in new accounts, to $390,000; and from that time until shortly before the close of the bank in June 1932, the amount on deposit in bankruptcy accounts varied between these two figures (R. 72). In the two months preceding June 1932, there was a small increase, and on June 21st of that year when the bank closed, the aggregate on deposit in the one hundred and twenty-three bankruptcy accounts stood at $416,833.90 (R. 72, 275). Interest was paid on the deposits at the usual rates fixed by the clearing house association (R. 273, 274).

Condition of Phillip State and the Bank Runs, August 1930—June 1931.

In August 1930 at the time Howard opened his first bankruptcy account with the Phillip State the total resources of the bank were four million dollars (R. 139). By December 1930 these had increased to four million six hundred thousand dollars (R. 139). The quarter-annual financial statement of the bank issued as of September 24, 1930, which Howard received and examined, showed total resources $4,534,377.88 which included bonds and securities $1,275,558.50, loans $2,413,813.08 and cash resources $551,369.46; total deposit accounts $3,590,455.68, and capital stock, surplus and undivided profits $752,717.83 (R. 86, 87, 271). Subsequent quarter-annual statements issued as of December 31, 1930 and March 25, 1931 reflected little change except for increases in total resources, cash resources and government securities (R. 89, 91, 92).

In the middle of April 1931, within a period of five days, four banks located on the north side of Chicago

closed their doors (R. 137). The failure of these banks precipitated bank runs on other north side banks (R. 169, 259). At the Phillip State a million dollars in deposits was withdrawn within the course of two or three days (R. 169, 72). As the run there developed, Beutel telephoned Howard and other large depositors and told them not to feel concerned, that the Phillip State was in a sound condition and that the Central Trust Company was advancing all cash necessary to meet the demand (R. 169, 259). About a week later Howard met with the officers of the bank and was informed that during the run, officials and directors of the Central Trust had visited the Phillip State, reassured depositors of the stability of the bank and publicly announced on the bank floor that the Central Trust would support the Phillip State to the fullest extent (R. 170-171, 260). The Central Trust loaned the Phillip State about a million dollars (R. 169).

By June 1931, the money borrowed from the Central Trust had been repaid and withdrawn deposits were commencing to return to the Phillip State (R. 176, 72). On June 7, 1931 two of the largest banks of Chicago, both located in the "loop" or business area of the city, merged with two other "loop" banks, in an attempt to save several hundred million dollars of deposits (R. 121). The National Bank of the Republic, a bankruptcy depository, merged with the Central Trust to form a new bank, the Central Republic Bank and Trust Company (R. 121, 201). The Foreman State National Bank, also a depository, having total deposits of nearly two hundred million dollars, was taken over by The First National Bank of Chicago (R. 121, 113).

With the announcement of the two mergers came a series of runs on outlying banks of the city (R. 171).

On June 8th on the south side, two banks, both bankruptcy depositories, closed (R. 138, 113). On the north side five banks closed (R. 137). At the Phillip State, depositors began a new run on the bank and withdrew about five hundred thousand dollars in deposits (R. 171, 193, 72).

ACTIVITY OF THE BANKRUPTCY COURT IN JUNE 1931 IN SUPERVISING THE DEPOSITORIES.

[The trial court refused the following proof offered by respondents: On or about June 8, 1931, Judge Carpenter, senior judge of the District Court for the Northern District of Illinois, called into conference Joseph Muir, chief deputy clerk of the court, for the purpose of discussing the banking situation, particularly the deposits of bankrupt estate funds in the bankruptcy depositories (R. 144, 145). The whole subject was reviewed with the judge, the amount of such funds in the depositories gone over, the size of the depository bonds examined (R. 145). Judge Carpenter directed Muir to telephone the various receivers and trustees in bankruptcy and ask them to file statements showing in what depositories they kept their funds and the respective amounts thereof (R. 148). Muir was also told to prepare a draft order for the court to enter directing the receivers and trustees to file periodic reports of their bankruptcy deposits (R. 145). Following this conference, Muir telephoned the receivers and trustees, including Howard, and told them of the court's request for a statement (R. 148, 263). On June 9, 1931, Howard filed such report showing $373,391.49 of bankruptcy funds in the Phillip State and $10,952.19 in the Foreman Bank (R. 148, 263, 154-155). Error was assigned in the Circuit Court of Appeals on the refusal of the trial court to admit this evidence but consideration

thereof was unnecessary under the decision reached (R. 319-321, 402).]

Shortly thereafter, Judge Carpenter communicated with Beutel at the Phillip State and conferred with him about the depository bond of the bank (R. 173). Judge Carpenter mentioned that Howard was carrying a substantial amount of bankruptcy funds in the bank and said that he thought the bond was too small (R. 173). Beutel told Judge Carpenter that he understood that because of the general banking conditions, bonding companies were cancelling bonds and refusing to write new ones. He also told Judge Carpenter to call Philip R. Clark, the president of the Central Republic, regarding the situation (R. 173). Judge Carpenter replied that instead of speaking with Mr. Clark he would call upon General Dawes, that he knew General Dawes (R. 173). The depository bond of the Phillip State was never thereafter ordered to be increased nor was the receipt by it of bankruptcy funds from receivers and trustees in the district in any way restricted as to amount or otherwise (R. 113).

About the same time that Judge Carpenter spoke with Beutel, Howard made inquiry of the officers of the Phillip State to find out what effect the bank mergers had had (R. 171, 193). Howard was told of the conversation between Judge Carpenter and Beutel, and of the judge's intention to call upon General Dawes (R. 173). He also was told that the officers felt no concern over general conditions inasmuch as they had the assurance of the Central Republic that it would give them full assistance to meet any emergency demand; that Clark had written a letter, which he had authorized to be published, stating that the Central would support the Phillip State in the general stress (R. 171-172). Howard examined the letter, which read: "Dear Mr. Beutel: We are co-operat-

ing with the loop banks in sending millions of dollars to the outlying banks, and are prepared to lend them further support consistent with sound banking practice. * * * In this emergency we are glad to lend our support if needed to the Phillip State Bank & Trust Company'' (R. 179). Howard told Beutel that with the Foreman banks closing and the general banking situation being what it was, he knew of no safer place than the Phillip State (R. 194).

On June 11, 1931 the District Court for the Northern District of Illinois, in an order entered by Judge Carpenter, directed all receivers in bankruptcy to file with the clerk of the court, every three months commencing July 1, 1931, a statement showing the amount of estate deposits respectively kept in the depository banks (R. 145, 134, 149). Although the order in words was limited to receivers, it was understood that trustees likewise were to report such deposits (R. 204-205, 134). On June 12th a certified copy of the order reached Howard through the mail and some weeks later his office prepared a report stating the amount of bankruptcy funds on deposit, as of June 30, 1931, in the Phillip State and in the Foreman Bank (R. 204, 264, 217). Approximately $300,000 was shown in the Phillip State (R. 217). The report was duly filed with the clerk of the court and together with reports filed by other receivers and trustees, was delivered to Judge Carpenter (R. 264, 148, 150, 153).

[The trial court refused to admit evidence offered by respondents which showed the following: After the June 11th order was entered, Judge Carpenter instructed the clerk to bring him all reports filed thereunder (R. 162). Upon receiving the June reports, the judge had his secretary prepare for his use a typewritten compilation thereof, setting forth, in the instance of each depository,

the names of all receivers and trustees who kept deposits there, and the amounts, both separately and in the aggregate, of their deposits (R. 156-158). The compilation stated the amount of Howard's deposits in the two depositories and disclosed, among other things, that in the National Bank of the Republic, the depository which had merged in early June with the Central Trust and whose bond had been fixed at $50,000.00, an aggregate of $1,103,783.32 of bankruptcy funds had been on deposit; that in the Foreman Bank, which also had then merged and whose bond was for $50,000.00, an aggregate of $331,333.76 funds had been deposited (R. 157, 163). The rulings of the trial court in connection with the proof of these facts were assigned as error in the Circuit Court of Appeals but likewise were not there considered because of the decision reached (R. 323, 322, 402).]

JULY 1931—JUNE 1932.

In early July 1931 Howard received and examined the quarter-annual statement of the Phillip State issued as of June 30, 1931 (R. 94, 271). While the April and June withdrawals were reflected, capital, surplus and undistributed profits remained unchanged (R. 94). Compared with the statement of March 25, 1931, deposits showed a decrease of $1,300,000 ($1,000,000 in April, $500,000 in June, with $200,000 returned), the decrease being from $3,811,638 to $2,464,138 (R. 92). Correspondingly, total resources decreased $1,000,000, from $4,601,248 to $3,660,960 (R. 91). An item of $300,000 "bills payable" evidently represented an advance by the Central Republic to the Phillip State in June (R. 182, 176).

During the summer of 1931, business at the Phillip State continued uneventfully except for the taking over by the bank of the Illinois State Bank of Evanston, a

small institution with $200,000 in resources and liabilities (R. 129, 131). On September 21, 1931, the Rogers Park National Bank, situated directly across the street from the Phillip State, closed (R. 173, 138). This, coming in the aftermath of the closing of the so-called "Bain chain", a group of twelve banks located in different parts of the city of Chicago, resulted in a run on the Phillip State (R. 195, 173). Howard telephoned Beutel, then secretary of the National Credit Association, a pool formed by the banks because of the general situation, and asked what effect the closing of the Rogers Park would have on the Phillip State (R. 174, 265). Beutel stated that the run was to be expected but that there was no need for concern, that the Chicago Clearing House Association in a general survey of the banking situation had examined the bank and designated it an "A" institution (R. 265, 174-175). Beutel also mentioned that the Central Republic had, as on previous occasions, advanced the necessary funds, and related that the Central Republic had increased its interest in the Phillip State (R. 173, 266, 174, 194). In October 1931, Howard received the quarter-annual statement of the Phillip State issued as of September 29, 1931 (R. 96). Compared with the statement of June 30th, total deposits were about $130,000 less, having decreased from $2,464,138.78 to $2,325,529.72 (R. 94, 96). (An exhibit introduced by petitioners showed an increase in total deposits at the end of September, over June deposits, by about $50,000 (R. 72).) Total resources decreased approximately $195,000, from $3,660,960 to $3,464,837 (R. 94, 96). On the other hand, cash resources and government securities increased over $200,000 from $445,922 to $649,644, and bills payable and money due other banks decreased over $50,000 (R. 94, 96). Capital stock, surplus and undivided profits remained the same (R. 96).

About the time the bank statement was received, Howard prepared and filed the September report for the district court as required by the order of June 11th (R. 205, 265). The report showed, as of September 30, 1931, deposits of approximately $250,000 of bankruptcy funds in the Phillip State and also deposits in the First National Bank (R. 205, 217, 265).

During the succeeding nine months, that is, from September 1931, until the close of the Phillip State in June 1932, business at the bank continued without material change. Howard met Beutel from time to time and discussed the efforts at stabilization being made by the National Credit Association and the Reconstruction Finance Corporation (R. 175). While a heavier, steady withdrawal of deposits occurred during the week of Christmas 1931, total deposits at the Phillip State varied little from October to January, and in February and March increased $310,000 (R. 177, 72). From January to June, bills payable were reduced by two-thirds, from $375,351 to $154,248 (R. 139). The quarter-annual statements issued as of December 31, 1931 and March 30, 1932, showed a further increase of $55,000 in cash and government securities (R. 98-99, 101, 96). In March 1932 the bank reached its highest point of liquidity for the period with quick assets constituting 37.54% of the total deposits (R. 72). Total resources continued around $3,500,000 (R. 101).

In January and April, 1932, Howard prepared the trustee's and receiver's report required by the order of June 11th (R. 205-206, 253). The January return showed $258,624.98 of bankruptcy funds in the Phillip State as of December 31, 1931; the April return showed $385,632.85 on deposit as of March 30, 1932 (R. 205-206). Both reports were duly filed with the clerk of the district court (R. 253).

Closing of Phillip State.

On June 18, 1932, the Devon Trust and Savings Bank, located on the north side of Chicago, closed its doors (R. 138). Within an hour thereafter, a run started on the Phillip State (R. 177, 122). There was no reason for anticipating it (R. 121-122). The bank remained open until 9:30 in the night in order to meet the demand of depositors who wished to withdraw (R. 122, 177). Howard was not in Chicago at the time and knew nothing of the situation (R. 266, 178). On the following Monday, June 20th, the run continued and on June 21st the bank closed (R. 122, 177-178). [The trial court refused to permit respondents to show that the cause of the closing of the Phillip State was a repudiation by the Central Republic of its promise to advance funds to the Phillip State in an emergency, and also would not permit respondents to show the circumstances under which the refusal was made (R. 178). Error on this ruling was assigned in the Circuit Court of Appeals but likewise not there considered because of the decision handed down (R. 315, 316).]

Thereafter a receiver was appointed for the Phillip State and its affairs have since been in process of liquidation (R. 39).

Other Bankruptcy Depositories in Chicago.

Petitioners introduced evidence over the objection of respondents showing that there were twenty-one banks which had had depository bonds on file in the District Court for the Northern District of Illinois during the period from August 1, 1930 to June 21, 1932, and the respective amounts of such bonds (R. 112-113, 107-112). This proof was permitted to stand without peti-

tioners being required to prove that any of these depositories was safer during the period than the Phillip State. Petitioners offered no evidence of the financial condition of these banks at that time, of the respective amounts of bankruptcy funds then kept on deposit in them, or of the relationship between such deposits and the particular depository bonds.* It already appeared that two of these depositories failed on June 8, 1931, and that two others, both large "loop" banks, had been compelled to merge with other banks (R. 138, 121, 201). An offer of proof by respondents on the comparative security of the other depositories was refused by the trial court (R. 277). These

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*Such proof, if offered, would have established that of the twenty-one depositories, five-sevenths either failed or had been, or were compelled to merge. The record supplemented by the official report of the Illinois State Auditor, *Statement showing Total Resources and Liabilities of Illinois State Banks,—at the close of business June 29, 1935,* pp. 26, 28, 31, 32, of which judicial notice may be taken, *McCrary* v. *Schenebeck,* 191 Ark. 698, 87 S. W. (2d) 572, 574, shows the following:

Depositories which failed: South Side Trust & Savings Bank, Washington Park National Bank, Peoples Trust & Savings Bank, South Side Bank & Trust Company, Transportation Bank of Chicago, Chicago Bank of Commerce, Cosmopolitan State Bank, Edgewater Trust & Savings Bank, Jackson Park National Bank, Woodlawn Trust & Savings Bank.

Depositories which merged: Foreman State National Bank, National Bank of the Republic, both of which were "loop" banks, Chicago Trust Company, State Bank of Chicago and Union Trust Company.

One of the depositories listed, the Oak Park Trust and Savings Bank of Oak Park, Illinois, was not located in Chicago and was first designated a depository less than a month before the Phillip State closed (R. 113).

rulings were assigned as error in the Circuit Court of Appeals but were not passed upon under the decision (R. 318-319, 322, 402).

THE CASE AS SUBMITTED TO THE JURY.

Petitioners tried the cause in the District Court on the theory that Howard, in making and maintaining deposits of bankruptcy funds in the Phillip State, was negligent, and that such alleged negligence constituted a breach of the condition of each bond sued upon, entitling petitioners to recover the amount of funds belonging to the estate in which such bond was given and which was lost when the bank closed (R. 8, 9, 10). Respondents challenged as a matter of law the assumption that the condition of the bonds comprehended, and that Howard had owed, a duty to regard the stability and safety of a bank which the bankruptcy court had designated a depository for bankruptcy funds; and denied as a matter of fact that Howard under the circumstances of the case had ever violated such a duty even were it supposed to have existed (R. 32, 35, 141, 291, 305, 306-307). The District Court accepted the theory of liability advanced by petitioners that such duty had been owed, and evidence on that basis was accordingly introduced. The statement in petitioners' brief, pp. 45-46, that the charged violation of the supposed duty had not been denied as a matter of fact, is untrue (R. 41, 44, 45).

During the trial, the court, as heretofore stated, permitted petitioners to show the making of the loans by the Phillip State to Howard (R. 77-78, 81), but excluded proof offered by respondents showing that the money had been borrowed on Howard's personal credit for the benefit only of the bankruptcy estates which he administered, in accordance with an established practice among trustees and

receivers in bankruptcy (R. 229-230, 258-259, 208, 209-215, 229, 254). The trial court permitted petitioners, as heretofore stated, to show the twenty-one depositories located in the bankruptcy district at some time during the period, without requiring any supporting proof of their respective financial position or strength (R. 112-113), and rejected an offer by respondents to pursue a line of such proof (R. 277). The court permitted the repeated retelling by six witnesses, called successively by petitioners, of the two runs at the Phillip State which occurred prior to July, 1931 (R. 117-118, 123-128) but prohibited counsel for respondents, in their argument to the jury, to refer as of common knowledge to the general banking situation in Chicago, in the district and in the country during the period (R. 290-291). The court, as heretofore stated, excluded proof offered by respondents showing that at the time of the city-wide runs in June, 1931, which followed the two mergers, the senior judge of the bankruptcy court of the district had had under consideration the effect of banking conditions on the security of the bankruptcy funds in the depositories, and had called for and received reports from the trustees and receivers, including Howard, of the respective amounts of such funds on deposit (R. 145, 148, 263, 154-155).

In its charge to the jury the trial court instructed that the jury was not privileged to consider occurrences outside the proof in the case although such occurrences were matters of common knowledge (R. 296). The court devoted its entire charge with the exception of one sentence to presenting the facts relied upon by petitioners and ignored the facts or theories of defense submitted by respondents (R. 295). The court, in a substantial portion of its charge commented in severe terms on the loans which Howard had made although evidence showing that the money had been

borrowed for the benefit of the estates had been excluded (R. 298-299). The court, in the only portion of its charge dealing with the conditions on which the jury could find for respondents, instructed that the jury could so find only if the evidence showed that the Phillip State was in a safe condition and that there was nothing there involving great hazards to the funds and that Howard knew of nothing which would challenge his right to deposit there (R. 299).

The foregoing rulings and instructions of the trial court, and others hereinafter discussed, were assigned as error in the Circuit Court of Appeals but were not there reviewed because of the decision reached (R. 313-345, 402).

SUMMARY OF ARGUMENT.

The express conditions of the trustee's and receiver's bonds were never broken. The case involves no failure of Howard to obey any order of the bankruptcy court. There was no breach of the condition of the bonds requiring Howard to account. The condition assuring Howard's performance of his official duties as trustee or receiver in bankruptcy was never violated.

Under the depositary system established by the Bankruptcy Act for assuring the safety of bankruptcy funds coming into the possession of trustees and receivers, no duty is owed by the trustee or receiver when making or maintaining deposits of funds in a designated depository of the bankruptcy court, to determine with care the condition or stability of the depository. The rule of non-responsibility is not affected by the number of banks qualified as depositories in the district, assuming such questions were before this Court; nor does the rule present any issue under the Fifth Amendment.

No question of fraud, corruption, malfeasance or bad faith is presented for review.

The risk covered by the bonds did not contemplate the solvency of any designated depository in which a trustee or receiver may have deposited bankruptcy funds.

If it be assumed that a trustee or receiver in bankruptcy, in making or maintaining deposits of bankruptcy funds in a designated depository, owes a duty of care to guard against loss through a closing of the depository, nevertheless, in this case under the facts proved and what mat-

ters this Court may judicially notice, Howard violated no such duty.

If the case on the record was one for a jury to decide, nevertheless, the judgment in the District Court was properly reversed and the cause remanded for a new trial, for the reason that reversible error was committed in the District Court's rulings upon the admission and exclusion of evidence, in remarks of the court during the trial, in restrictions placed upon argument of counsel for respondents, in instructions given to the jury, and in refusal to instruct as requested by respondents.

ARGUMENT.

Petitioners' brief, in its statement of the principal question presented, p. 4, in its specification of errors to be urged, p. 14, and in the argument made throughout, has sought to impress upon this case the stamp of fraud and corruption. No assertion of the presence of either was made in the trial court. Issue was there joined and the case tried on the question solely of whether Howard had conformed to the general standard of due care in performing a supposed duty of judging the condition of the Phillip State when making bankruptcy deposits there. The complaint alleged no fraud or corruption (R. 2-10); the question of whether Howard had been guilty of any fraud or corruption was never submitted to the jury (R. 295-300). The charge is made here, although unheralded by anything below and without foundation in the record.

I.

THE EXPRESS CONDITIONS OF THE TRUSTEES' AND RECEIVERS' BONDS WERE NEVER BROKEN.

The recovery sought of the respondents depends wholly upon the extent of their undertaking in the bonds sued upon. The measure of their responsiveness in these suits can have no greater breadth than that to be found in the language of the bonds. A risk-bearing agency, not merely Howard, has been made party to this cause, and its alleged liability can be adjudged only in the light of the risk it in fact assumed. Whether a depression loss may be shifted to it must rest on its contract.

The trustee's bonds involved are official bonds required by Section 50 of the Bankruptcy Act (11 U. S. C. A. 78(b)), and are in the form prescribed by the General Orders and Forms in Bankruptcy, No. 25 (11 U. S. C. A. 53). The receiver's bonds are likewise official bonds, *In re Walker Grain Co.*, 3 F. (2d) 872, 874 (C. C. A. 5); *In re John A. Etheridge Furniture Co.*, 92 Fed. 329 (D. C. Ky.). The respondents, under the express terms thereof, bound themselves to pay any loss resulting to the estates from (a) a failure of Howard to obey any order of the bankruptcy court entered in relation to the estates, (b) a failure of Howard faithfully and truly to account for all moneys, assets, and effects of the estates, and (c) a failure of Howard faithfully to perform his official duties as trustee or receiver (R. 59, 65).

A.

The Case Involves no Failure of Howard to Obey Any Order of the Bankruptcy Court.

There is no evidence whatsoever of a breach of the proviso of the bonds assuring performance by Howard of orders of the bankruptcy court. The record discloses no instance in which Howard failed to obey any order made in relation to the estates, and there certainly is no showing that the proximate cause of the loss sustained by the estates was the disobedience by Howard of a court order.

Petitioners say, p. 18, that respondents did not produce the reports which Howard had made "from June 9, 1931 until after June 11, 1932," pursuant to the order of June 11, 1931 (petitioners inaccurately refer to the order as of July 1, 1931) (R. 145-146), that "secondary evidence was given to show that something had been taken to the clerk's office from time to time," and that the "jury was entirely

justified in believing that Howard had not made any such report * * * save to a deputy clerk, on June 9, 1931."

The record shows that the reports filed by Howard under the June 11th order were lost and that upon proper foundation being laid, the fact of the preparation and due filing of such reports, and the precise contents of each report, were established by the testimony of several witnesses (R. 204-206, 264-265, 252-253, 217, 148, 153, 160, 184). Petitioners' statement that the jury was justified in believing that no report had been made ignores the fact that the trial court never submitted to the jury any issue upon his failure to report (R. 295 *et seq.*), and in effect directed a verdict to the contrary. Further, petitioners' reference to the report of June 9, 1931 is confusing. That report was filed not under the June 11th order which directed the filing of statements commencing July 1, 1931, but in response to Muir's request, on Judge Carpenter's instruction, in early June for an immediate report from the trustees and receivers pending the entry of the June 11th order (R. 148).

B.

There was no Breach of the Condition of the Bonds Requiring Howard to Account.

The second condition of the bonds is that Howard shall faithfully and truly, or well and truly, account for all moneys, assets and effects of the estates coming into his hands and possession. Inasmuch as moneys alone are involved in these suits, the portion of the proviso dealing with assets and effects need not be considered.

The word "account" as used in written instruments has been variously construed in the decisions (1 C. J. 596, sec. 1). It is not one of art, and reference to the different

interpretations is of little value. In the bonds sued upon, the word "account" is preceded by the expression "faithfully and truly," or "well and truly." The use of the word in this context would indicate that all that was required of Howard was his making an honest and accurate report or statement as to what money had come into his hands and the manner in which he had disposed of it. Giving the word, however, a broader significance, the condition that Howard "account" may fairly be taken as meaning that principal and surety assumed responsibility for loss in either of two instances; *first,* if Howard failed to make honest and accurate reports or accountings of estate funds as required of him by statute, or order or rule of court, or other authority; *second,* if the disposition of the funds as so reported or accounted for, was not pursuant to law.

The record discloses no dereliction by Howard in the making or rendering of any reports or accounts of the funds of the estates which he was under duty to make. It was stipulated that Howard made and duly filed with the bankruptcy court and its referee, in each of the estates involved, during the course of administration, the usual periodic reports and accounts of estate funds required of all trustees and receivers in bankruptcy under the statutes and rules (R. 144, 266). The reports required by the order of June 11, 1931, were made, as heretofore stated.

Nor does the record show that the disposition of the funds as thus reported and accounted for, was contrary to law. The reports filed and accountings made disclosed to persons interested, whether the bankruptcy court, the creditors of the estate, or the casualty company, that the funds belonging to the estates had been deposited and were on deposit with a designated depository of the bankruptcy court. Actual deposit of the funds with the deposi-

tory was not only pursuant to law but required by law. Section 47 (a)(3) of the Bankruptcy Act (11 U. S. C. A. 75(a)(3)) imposes a mandatory duty on trustees in bankruptcy to "deposit all money received by them in one of the designated depositories," and receivers in bankruptcy have a similar obligation, *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.*, 54 F. (2d) 329 (C. C. A. 8).

It will be observed that this cause is not concerned with the usual issues of an accounting case brought against a trustee where improper withdrawals or disbursements are charged, cf. *In re Hoyt & Mitchell,* 127 Fed. 968 (D. C. N. Car.), *In re Perelstine,* 44 F. (2d) 62 (D. C. Pa.). The funds claimed for the one hundred and twenty-three estates were never used nor disbursed by Howard; they were on deposit with the depository and were lost when the depository closed its doors. The sole question which might arise with respect to such disposition of the funds in accordance with law would relate to whether, as a matter of law, an official duty existed in Howard, as trustee or receiver in bankruptcy, to judge, with care, the condition or stability of the designated depository in which estate funds were deposited, and if it did exist, whether as a matter of fact it had been performed. This question is considered hereinafter, pp. 36-67, 75-99.

Petitioners refer, p. 19, to *Hale County, Texas* v. *American Indemnity Company,* 63 F. (2d) 275 (C. C. A. 5) and *U. S.* v. *Rehwald, et al.,* 44 F. (2d) 663 (D. C. Cal.) as defining the meaning of "account" in a bond. Neither case is in point. The first does not involve the bond of an official under duty to deposit in a designated depository but that of the depository itself, and holds consistent with authority that the liability is that of an insurer. The second case concerns the use of "account" in a criminal statute.

Petitioners say, p. 20, that "Howard had the primary duty of distributing" the bankruptcy funds on deposit in the Phillip State, and that "Because of the delay in payments, if for no other reason, and the final loss because of such delay, there was not a faithful accounting." This suggestion that the loss to the estates occurred because of a delay in distribution to creditors, apparently finds its source in a similar suggestion contained in the dissenting opinion below (R. 403). There is nothing in the record concerning any delay in the regular administration and progress of any of the estate involved, let alone in which one of the estates such alleged delay occurred. The complaint did not so aver but on the contrary showed that the larger number of accounts here involved had been opened at the Phillip State during the latter part of the period under review (R. 12-29). No evidence of any delay was ever offered; the trial court did not so charge (R. 294 *et seq.*); and petitioners never so contended, whether in the District Court or in the Circuit Court of Appeals. Nor was there any "primary duty" in Howard to distribute. Receivers in bankruptcy make no distribution pending adjudication. Trustees in bankruptcy can make payments only when the referee has prepared the dividend sheets and declared the dividend, and then the payments must be made within ten days, Secs. 39(a), 65(a)(b), 47 (a)(9) of the Bankruptcy Act (11 U. S. C. A. 67 (a)), 105 (a)(b), 75 (a)(9). No evidence whatsoever was introduced relative to the declaration or payment of dividends in any of the estates. Petitioners' statement, p. 20, that of the $132,707 deposited to the credit of National Theatre Corporation on August 25, 1930, $52,174.17 "still" was on deposit at the time of the closing of the bank, is without foundation in the record. There is no showing in respect to this, or any other account, of the extent of withdrawals of funds

originally deposited, or their replacement by new deposits. Funds on deposit at the close of the bank did not necessarily represent original deposits.

C.

The Condition Assuring Howard's Performance of His Official Duties as Trustee or Receiver in Bankruptcy was Never Violated.

The trustee's bonds were further conditioned on Howard's faithful performance of "his official duties as said trustee" (R. 59-60); the receiver's bonds, on the discharge of "the duties of his trust as such receiver" (R. 65-66). It is agreed that in legal intendment the provision of the receiver's bonds is in this respect the same as that of the trustee's (petitioners' brief, pp. 32, 9).

The problem of construction presented is what conduct on Howard's part was thereby embraced, what risk did the casualty company undertake under this requirement of the bonds assuring performance of "official duties"? Both petitioners and the trial court assumed as a matter of law in presenting and submitting the case to the jury that a want of ordinary care by a trustee or receiver in regarding the financial condition of a designated depository in which estate deposits were made and in judging the possibility of such depository being closed, whether by a bank run or otherwise, would constitute a violation of his official duties as trustee or receiver within the meaning of his bond, and his surety would become liable for the loss. It was conceived that the duties of the trustee or receiver in bankruptcy with respect to depositing estate funds in a designated depository were identical with those of the common law trustee or fiduciary making deposits.

Are these, official duties of a trustee or receiver in bankruptcy? Did the casualty company in executing each bond assure any one interested that Howard would determine, with care, the condition and stability of any designated depository in which he deposited bankruptcy funds? Hereafter, pp. 36-67, it will appear that under the depository system established in bankruptcy for the safekeeping of bankruptcy funds, such duty was lodged elsewhere than in the trustee or receiver and an elaborate machinery for securing the safety of funds set up. At the present, the inquiry is more narrow and is confined to a construction of the bonds in the light of the official duties imposed by the Bankruptcy Act and General Orders upon trustees and receivers.

The law has distinguished between the so-called official bond of an officer or quasi-officer required by law to secure the performance of his official duties, and the ordinary, common law bond. Liability on an official bond cannot be resolved by mere examination of the language of the bond. The bond can be construed only by strict reference to the law or statute creating the office and providing the duties thereof. A surety on an official bond undertakes merely that the officer or quasi-officer will faithfully perform those duties stated and defined by law as pertaining to his office, not any act in which the officer may chance to engage. While conduct of an officer resulting in loss may render him liable as a matter of general law, it does not necessarily follow that a recovery may be had therefor on his official bond, *District of Columbia* v. *Petty*, 229 U. S. 593; *City of Wilkes Barre* v. *Rockafellow*, 171 Pa. St. 177, 33 Atl. 269, 270, 50 Am. St. Rep. 795, 30 L. R. A. 393; *Lowe* v. *City of Guthrie*, 4 Okla. 287, 44 Pac. 198, 200-201; *City of Salisbury* v. *Lyerly*, 208 N. C. 386, 180 S. E. 701, 703; *Orton* v. *City of Lincoln*, 156 Ill. 499, 41 N. E. 159;

City of Parsons v. *Fidelity & Deposit Co.*, 29 F. (2d) 417 (D. C. Kan.), reversed on other grounds 43 F. (2d) 315 (C. C. A. 10); *Campbell* v. *American Bonding Company*, 172 Ala. 458, 55 So. 306.

Section 47 of the Bankruptcy Act (11 U. S. C. A. 75) sets forth the official duties of the trustee which relate to the handling of funds pending disbursements or distribution, as follows: The trustee in bankruptcy shall—

"Deposit all money received * * * in one of the designated depositories" (11 U. S. C. A. 75 (a)(3));*

"Disburse money only by check or draft on the depositories in which it has been deposited" (11 U. S. C. A. 75 (a)(4));

"Furnish such information concerning the estates * * * and their administration as may be requested by parties in interest" (11 U. S. C. A. 75 (a) (5));

"Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts" (11 U. S. C. A. 75 (a)(6));

"Lay before the final meeting of the creditors detailed statements of the administration of the estates" (11 U. S. C. A. 75 (a)(7));

"Make final reports and file final accounts with the courts fifteen days before the day fixed for the final meetings of the creditors" (11 U. S. C. A. 75 (a)(8));

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*The depositories referred to are provided by section 61 of the Bankruptcy Act (11 U. S. C. A. 101) which is as follows: "Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

> "Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after * * * appointment and every two months thereafter, unless otherwise ordered by the courts" (11 U. S. C. A. 75 (a)(10)).

The duty of the trustee to disburse money only by check or draft on the depository in which the estate funds are deposited is supplemented by General Order No. 29 (11 U. S. C. A. 53), which provides that such check or warrant shall be countersigned by a judge of the bankruptcy court, or a referee designated for that purpose, or by the clerk of the court or his assistants under an order made by the judge.

The duties of the receiver in bankruptcy relating to the handling of estate funds prior to adjudication are the same as those of the trustee, *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.*, 54 F. (2d) 329, 335 (C. C. A. 8).

Thus expressed in the statute, the enumerated duties of the trustee or receiver in bankruptcy include no duty to determine with care the financial condition or stability of the depository in which estate funds are deposited. Under the Act the extent of the official duties of such officer with reference to the handling of estate funds pending adjudication or distribution are these: he must deposit the funds in one of the designated depositories of the court; he may make disbursements only upon a duly countersigned check or warrant; he must keep regular accounts thereof and file the required reports.

Petitioners' brief, pp. 23-26, refers to the cases of *City of Wilkes Barre* and others above cited, and agrees with the rule which they announce that a surety on an official bond may be held responsible only for failure to perform his offi-

cial duties, but contends that the rule is inapplicable. Petitioners argue, apparently, that the duty of a receiver or trustee in bankruptcy to deposit funds in a designated depository is a duty *virtute officii,* that duties *virtute officii,* if done negligently and with loss, result in liability of the surety, and that accordingly a failure by a receiver or trustee to determine with care the condition and stability of a designated depository when making or maintaining a deposit of funds therein constitutes a negligent discharge of the duty to deposit, for which liability may be imposed on the surety.

Undoubtedly, a deposit by a trustee or receiver in a designated depository is an act done *virtute officii,* and duties *virtute officii* may occasion liability to the surety if performed negligently. The argument, however, begs the question. It does not follow that a failure to determine with care the condition of a designated depository is a negligent discharge of the duty to deposit. That depends on the scope of the duty. The duty to deposit in a designated depository is a duty to deposit in a bank whose qualifications as a depository have been determined by the person or authority designating it. In this circumstance, the duty to deposit in a bank qualified, excludes a duty to determine condition and stability. This does not mean that liability would not accrue to the surety if the trustee or receiver was careless in such matters as depositing funds to a wrong account or issuing a check to a wrong person.

In *State* v. *Bowers,* 26 Oh. Cir. Ct. 326, aff'd. 70 Oh. St. 423, 72 N. E. 1155, the construction of a statute exonerating an officer from liability for loss of funds deposited in a designated depository, was before the court. The language of the statute granted relief from liability for such loss except in the case of default or neglect. The officer there refused to make deposits in the depository on the ground

that the exonerating statute afforded him no protection because it expressly reserved liability in the case of neglect. His position was that if he were to be held responsible in the event of a failure to exercise due care and caution for the safekeeping of the funds in making and maintaining deposits he should have authority to deposit them where he believed them most secure and not in a designated depository. The court held that the reservation in the event of neglect had no application to a duty of care with respect to the bank selected or the amount of its security but merely to the manner in which the officer dealt with the deposits after they had been placed in the depository; that the neglect referred to in the statute had no application to the solvency or stability of the bank but to the exercise of the officer's disbursing power. The court said:

> "If the treasurer deposits the public funds according to the ordinance of the city council and they are lost, he is not to be held liable unless his carelessness has contributed thereto; the carelessness contemplated is not related to the propriety of the ordinance or the care of the bank selected, or its bond, but the manner of dealing with its deposits after they are so made. If the treasurer should, by carelessness, give an order on the bank to the wrong person, or for the wrong amount, and the order is paid, in such case he is to be held responsible."

In *City of Newburgh* v. *Dickey,* 150 N. Y. S. 175, 178, 164 App. Div. 791, mandamus was brought against a city treasurer who refused to deposit city moneys in a designated depository on the ground that he might be held liable for moneys lost if the depository failed. In ordering the writ, the court said:

> "And the bond prescribed is that such officers shall 'faithfully discharge the duties of their respective

offices, and pay over all moneys received by them, respectively'. * * * The defendant's argument is that since he is required to give a bond and is thus responsible, the fair intendment is that he should select the depository. * * * Neither the requirement of this bond nor the general rule would extend to moneys received by the official, while those moneys were held by a depository designated by another body or officer of the city in accord with law and exclusive of any power cast upon him. * * * The condition of the bond would be met if he discharged his duty with respect to the moneys when not in the exclusive charge of the depository * * *."

What petitioners are really seeking is not a construction of the provision of the Bankruptcy Act prescribing the official duty to deposit in a designated depository but an expansion of the duties enumerated in the Act. In substance, they ask that by judicial construction there be read into the statute a duty on the trustee or receiver to determine the qualifications of the designated depository, a duty whose performance it then could be contended required due care. Such duty, however, was not provided. That it will not be imposed by law is clear from the depository system prevailing in bankruptcy.

II.

UNDER THE DEPOSITARY SYSTEM ESTABLISHED BY THE BANKRUPTCY ACT FOR ASSURING THE SAFETY OF BANKRUPTCY FUNDS COMING INTO THE POSSESSION OF TRUSTEES AND RECEIVERS, NO DUTY IS OWED BY THE TRUSTEE OR RECEIVER WHEN MAKING OR MAINTAINING DEPOSITS OF FUNDS IN A DESIGNATED DEPOSITORY OF THE BANKRUPTCY COURT, TO DETERMINE WITH CARE THE CONDITION OR STABILITY OF THE DEPOSITORY.

In concluding heretofore that the condition of the bonds requiring Howard to account, interpreted as meaning to make disposition in accordance with law, had been met by his deposit of the funds in a designated depository, it was suggested, p. 27, *supra*, that some question might arise as to whether a disposition in accordance with law involved not only his making and maintaining the deposit in a designated depository but his judging, with care, of the condition and stability of the depository. This question already has been considered in the discussion above concerning the various official duties imposed by the Bankruptcy Act and General Orders upon the trustee or receiver with respect to his handling of bankruptcy funds coming into his possession. In the enumeration of such duties no provision was made that the officer in making or maintaining the deposit should consider, with care, the qualification, condition or stability of the designated depository. However not only has the Bankruptcy Act failed so to provide; under the depository system which it set up the supposed duty does not exist.

A.

Responsibility of Fiduciaries and Public or Quasi-public Officers for Funds Placed in Their Custody and Lost in a Bank Failure.

The case presented concerns liability for bankrupt estate funds which were deposited in a designated depository of the bankruptcy court and were lost when the depository closed its doors. The case should be distinguished from cases in which the bankruptcy funds involved were never deposited in any bank, depository or otherwise, or if deposited, were not deposited in a designated depository. Undoubtedly, in such cases liability on the official bond arises if the funds are lost, and, indeed, arises without regard to whether negligence is present. In the case before the Court, the funds were concededly on deposit in one of the regular designated depositories of the bankruptcy court and were so on deposit when the depository ceased doing business.

The books contain literally hundreds of cases in which courts have passed upon the responsibility of fiduciaries and public and quasi-public officers for funds placed in their custody and lost on some bank failure. These cases divide themselves into three classes according to the rule of responsibility applied.

In the first class the rule is one of absolute liability. It is limited in application to public officers and holds them strictly liable as insurers for whatever loss may occur. Due care and good faith are immaterial, *Mecklenberg County* v. *Beales, Treasurer*, 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285; *Town of Cameron* v. *Hicks*, 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926. In none of these decisions, however, was the court concerned with a depository system of the kind hereinafter described.

In the second class, the rule of ordinary care and prudence is followed. Here, the common law fiduciary or the public or quasi-public official is held liable only in the event of a failure to exercise ordinary care and prudence as to the safety of the bank when making or maintaining deposits. Common law trustees, *Barney* v. *Saunders*, 57 U. S. (16 How.) 535; *Anguera* v. *Yturria*, 80 F. (2d) 57 (C. C. A. 5); *Carey* v. *Safe Deposit & Trust Co. of Baltimore*, 168 Md. 501, 178 Atl. 242, equity receivers, *Neff* v. *Harmon*, 145 Okla. 114, 291 Pac. 518, assignees for the benefit of creditors, *In re Stone's Assignment*, 220 Ia. 1341, 264 N. W. 604, executors, *In re Kohler's Estate*, 15 Wash. 613, 47 Pac. 30; *In re Workman's Estate*, 196 Ia. 1108, 196 N. W. 35, administrators, *Hart* v. *Savary*, 114 Fla. 41, 152 So. 705; *In re Olson's Estate*, 206 Ia. 706, 219 N. W. 401; *Harper* v. *Betts*, 177 Ark. 977, 8 S. W. (2d) 464, and guardians, *In re Welch's Estate*, 100 Mont. 47, 45 Pac. (2d) 681, are held liable for estate funds lost in a closed bank only if they have failed in such duty. In this class, likewise, are found those cases of public officers in which the courts refuse to apply the strict rule and merely hold them liable for a failure to exercise due care and prudence, *Wilson* v. *People*, 19 Colo. 199, 34 Pac. 944, involving a clerk of court; *State* v. *Copeland*, 96 Tenn. 296, 34 S. W. 427, town trustee; *Town of Danbury* v. *Riedmiller*, 208 Ia. 879, 226 N. W. 159, town treasurer; *State* v. *Gramm*, 7 Wyo. 329, 52 Pac. 633, 40 L. R. A. 690, state treasurer. As with the first class of cases none of the above decisions concerns itself with a depository system of the kind hereinafter described.

In the third class, the fiduciary or depositing officer is not held responsible for funds lost on deposit. Unlike the cases falling in either the first or second class, each of the cases in the third class involves some depository sys-

tem set up by statute for the administration and safekeeping of the funds pending disbursement, payment or distribution. While the systems vary in structure—depository systems not only differ among jurisdictions but in the same jurisdiction—it is characteristic of all these systems that they divide authority over the funds while in safekeeping among different persons. The extent of discretion and control over funds which the officer or fiduciary in the first two classes of cases exercised is not enjoyed by the depositing fiduciary or officer.

The principle underlying the systems is essentially that of checks and balances, and as carried out structurally involves the following features: (a) the fiduciary or officer who receives the funds and who generally is vested with all or some amount of the disbursing power is not permitted to retain the funds in his own possession during the period of safekeeping or exercise any general discretion as to the place where they are to be kept; (b) he is required to deposit the funds in a depository designated for that purpose and can make no deposits of, nor can he place, the funds elsewhere; (c) the power to designate and supervise such depository, to revoke its designation and designate new depositories, is lodged with a person or body other than the fiduciary or officer. By such a division of authority not only is risk of loss, through the insolvency of some person, minimized, but likewise the possibility of unlawful use of the funds or other mishandling. It is not intended to suggest by what has been said that the only checks and balances to be found in depository systems are the three above stated. Some systems are quite elaborate in this respect. However, in all of the cases of the class here considered, these three are common to the systems involved, and are held to be essential in determining whether the depositing fiduciary or officer is relieved in law from responsibility for funds lost while on deposit.

The requirement that the fiduciary or officer promptly deposit the funds in a depository chosen for such purpose by the designating authority and the consequent shifting away from him of the power or discretion to select and designate the depository, form the basis upon which the courts hold that the legislative intent was to impose no liability upon the depositing fiduciary or officer in the event of loss through a closing of the depository. The decisions point out that where the stated features appear and his discretion is thus limited, the fiduciary or officer was not intended to be an insurer of the funds, and what an ordinary prudent person might have done with his own moneys in depositing them in the depository is wholly irrelevant. On the other hand, where some of the features are not present, as where the depositing officer is required by statute to deposit the funds in a bank but has authority to designate what bank shall act as depository, it is held that the legislative intent was not to relieve the depositing fiduciary or officer from responsibility for the loss, *State* v. *Bobleter,* 83 Minn. 479, 86 N. W. 461.

A depository system is provided for funds administered in bankruptcy. This system will be considered before the decisions in the third class of cases are examined.

B.

The Depository System in Bankruptcy.

Under the Bankruptcy Act and General Orders, the safekeeping of bankruptcy funds is governed by a well-fashioned depository system. Safety and proper custodianship are sought not in individuals but in an administrative system. Checks and balances are present and duties and relationships defined.

1.

THE TRUSTEE OR RECEIVER IN BANKRUPTCY AND HIS DUTIES WITH RESPECT TO FUNDS COMING INTO HIS POSSESSION FOR SAFEKEEPING.

Trustees and receivers in bankruptcy are statutory officers, *United States* v. *Union Sur. & Guar. Co.*, 118 Fed. 482, 486 (D. C. N. Y.); *Bingaman* v. *Commonwealth Trust Co.*, 1 F. (2d) 505, 506 (D. C. Pa.); *Meehan* v. *King*, 54 (2d) 761, 763 (C. C. A. 1). Section 33 of the Act (11 U. S. C. A. 61) states expressly that the office of trustee is created, pursuant to the provision of the statute, and General Order XL (11 U. S. C. A. 53) defines the office of receiver as that of a custodian within the meaning of Section 48 of the Act. The name "trustee" or "receiver" does not connote its common law usage. Petitioner's argument in several places of their brief confuses the obligations of the common law fiduciary with that of the bankruptcy officers. As was said in *Imperial Assurance Co.* v. *Livingston*, 49 F. (2d) 745, 748 (C. C. A. 8):

> "In framing the machinery to work out the purposes of the Bankruptcy Act, Congress made use of terms (such as referee, trustee, receiver) which were taken from the body of the general law * * *. But the importations were of terms or names rather than of definitions; for example, referee in bankruptcy does not mean an officer with the same powers and duties as a referee in equity, and the same is true of trustees and receivers in bankruptcy. * * * Resort must first be had to the act in order to ascertain, through the definition therein of powers and duties, the real meaning of the terms used therein."

While the provisions of the Act and general orders relating to the safekeeping of bankrupt estate funds do not

expressly apply to receivers, it is well settled that the duties of receivers in this respect are the same as those of trustees, *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.*, 54 F. (2d) 329, 335 (C. C. A. 8).

Trustees and receivers are depositing officers. They are required to "deposit all money received by them in one of the designated depositories," Section 47 (a)(3) of the Bankruptcy Act (11 U. S. C. A. 75 (a)(3)). This duty is mandatory, *In re Potell*, 53 F. (2d) 877, 879, (D. C. N. Y.); *In re Hoyt*, 119 Fed. 987, 988 (D. C. N. C.); *In re Kyle*, 181 Fed. 617, 621 (C. C. D. Mass.); *Huttig Mfg. Co.* v. *Edwards*, 160 Fed. 619, 622-623 (C. C. A. 8); *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.*, 54 F. (2d) 329, 335 (C. C. A. 8). As one text-writer in speaking of the duties of such officer under Section 47(a)(3) said, "He is given no discretion in the matter, and ordinarily it is not proper for him to deposit any of the funds in any other bank even temporarily," that he "should, therefore, deposit in the designated depository all funds which come into his possession as soon as possible after they are received," A. S. Woodman, *A Treatise in the Law of Trustees in Bankruptcy*, Boston, Little, Brown & Company, 1909, p. 51, sec. 35(a). Thus, depositing estate funds in a bank will not save the deposit from being unlawful if the bank is not a designated depository, *In re Potell*, 53 F. (2d) 877 (D. C. N. Y.); *In re Hoyt*, 119 Fed. 987 (D. C. N. C.). Nor will an order by the district court in bankruptcy specifically directing that the deposit be made in a non-designated bank render the deposit any the less illegal, *Huttig Mfg. Co.* v. *Edwards*, 160 Fed. 619, 622 (C. C. A. 8); *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.*, 54 F. (2d) 329 (C. C. A. 8). Similarly, a disbursement by the trustee or receiver out of funds in his possession, without first depositing the funds in a designated depository and then making the disbursement,

is improper, *In re Hoyt & Mitchell,* 127 Fed. 968 (D. C. N. C.); *In re Kyle,* 181 Fed. 617 (C. C. D. Mass.). On the other hand, there is no need for the trustee or receiver, before depositing in a designated depository, to secure an order directing the same, *In re Singer Furniture Corp.,* 47 F. (2d) 780, 783 (D. C. N. Y.).

The trustee or receiver is obliged to determine whether the particular banking institution in which he proposes to make deposits is a designated depository. This he can do by examining the formal order of designation required by statute, Section 61 of the Bankruptcy Act (11 U. S. C. A. 101). The mere fact that a bank may have given a depository bond as required by statute does not make it a designated depository if no order of designation has been entered in the bankruptcy court, *In re Ocean City Title & Trust Co.'s Bond,* 6 F. Supp. 311 (D. C. N. J.). Where the order of designation places some restriction upon the making of deposits, as a limitation upon deposits in excess of a stated amount, the trustee or receiver is expected to observe such restriction. However, if the order is a general order, the trustee or receiver is free to make deposits without particular restraint. In *Illinois Surety Co.* v. *United States,* 226 Fed. 665, 667 (C. C. A. 7), the court refused to hold that upon the failure of a depository, those depositors who had made deposits after the deposits of others had equalled the penal sum of the depository bond, could not share in the proceeds of the bond, saying:

> "In support of the first contention, it is urged that, as the court [district court in bankruptcy] may from time to time order an increase in the amount of the bond [given by the designated depository to assure against loss of bankrupt estate funds], every depositor, before making his deposit, must ascertain whether the amounts then owing might exhaust the penalty,

and, in that event, he must see to it that an increase of the bond is ordered, if he desire to share in the protection.

The statement of the proposition carries its own refutation. No such limitation is expressed in, and none assuredly will be implied from, the language either of the statute or of the bond itself." (Words in brackets added.)

Trustees, and consequently receivers, as depositing officers, are required within the first month after appointment and every two months thereafter, to make and file reports with the district court in bankruptcy showing the amount of bankrupt estate funds on hand and what other information the court shall require, Sec. 47 (a) (10) of the Bankruptcy Act, (11 U. S. C. A. 75 (a) (10)). The district court, as hereinafter stated, occupies the position of the designating and administrative authority in the depository system provided by the Act.

Bankruptcy funds in the possession of a trustee or receiver pending deposit in a designated depository are not private funds but funds in *custodia legis* subject to administration under the Constitution and laws of the United States, *In re Ocean City Title & Trust Co.'s Bond,* 6 F. Supp. 311 (D. C. N. J.). While pending deposit of the funds, the receiver has custody and the trustee title thereof; after deposit in a designated depository identity of the funds ceases and they become simple contract claims against the bank, *Gardner* v. *Chicago Title & Trust Co.,* 261 U. S. 453. Petitioners' brief, pp. 34, 39, refers to the title of the trustee in funds prior to deposit as though it were the full title of a common law fiduciary. The title of the trustee, however, is a limited one, *Imperial Assurance Co.* v. *Livingston,* 49 F. (2d) 745, 749 (C. C. A. 8). The

reference in petitioners' brief, pp. 12, 34, 39, 43, to bankruptcy funds as "private funds" or "private moneys" is a loose one. The cases cited in connection therewith, p. 39, merely hold that a bankrupt estate is a general and not preferred creditor of a depository which has failed. Public moneys on deposit in a designated depository likewise represent only general claims in the event of a failure of the bank, *Potter* v. *Fidelity & Deposit Co.*, 101 Miss. 823, 58 So. 713, 715; *City of Parsons* v. *Fidelity & Deposit Co.*, 29 F. (2d) 417, 423 (D. C. Kan.), reversed on other grounds 43 F. (2d) 315 (C. C. A. 10).

Trustees and receivers are not merely depositing officers; they also make disbursements. However, their power to disburse is limited by the Act and General Orders. Disbursements cannot be made out of funds in possession but must be made from funds on deposit, *In re Hoyt & Mitchell*, 127 Fed. 968 (D. C. N. Car.); *In re Kyle*, 181 Fed. 617 (C. C. Mass.). Section 47(a)(4) of the Act (11 U. S. C. A. 75 (a)(4)) provides that disbursements of funds on deposit may be made "only by check or draft" on the depository. General Order No. 29 (11 U. S. C. A. 53) provides that "No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk (of the court) or his assistant under an order made by the judge * * *." These requirements are likewise mandatory, *Huttig Mfg. Co.* v. *Edwards*, 160 Fed. 619, 622-623 (C. C. A. 8); *In re Hoyt*, 119 Fed. 987, 988 (D. C. N. Car.). In some districts it has been held that these provisions prevent the trustee or receiver from making deposits in his name as such officer, but require the deposits to be made in the name of the bankruptcy court, *In re Cobb*, 112 Fed. 655 (D. C. N. Car.).

2.

THE BANKRUPTCY COURT AS THE DESIGNATING AND ADMINISTRATIVE AUTHORITY.

The district court in bankruptcy has absolute authority over the designation and supervision of depositories for bankruptcy funds, Section 61 of the Act (11 U. S. C. A. 101). Exclusive discretion and power are given it to select among banking institutions and designate those which are to act as depositories. No restriction is placed by the Act upon the terms which may be required as a condition to designation except that a depository bond payable to the United States shall be furnished, *ibid.* The amount of the bond is left to the approval of the court, and it may from time to time increase the amount thereof, *ibid.* Such depository bonds are required to be filed of record in the office of the clerk of the court, Sec. 50(h) of the Act (11 U. S. C. A. 78(h)). The court has full power to change the depository and appoint new ones as the occasion may require. It may, by order, limit the amount of bankruptcy deposits which a depository may accept to the penal sum of its depository bond. Recently, under General Order LIII, the duties of the court with respect to depository bonds have been more specifically defined.

The court in designating and supervising depositories acts principally in an administrative rather than judicial capacity, see discussion, *Board of Finance* v. *First National Bank,* 71 Ind. App. 290, 124 N. E. 768. It employs summary orders, *In re Howard,* 130 Fed. 1004 (D. C. Cal.); *In re Ocean City Title & Trust Co.'s Bond,* 6 F. Supp. 311 (D. C. N. J.); *In re Potell,* 53 F. (2d) 877 (D. C. N. Y.); requires reports from trustees, receivers and depositories, Section 47(a)(10) of the Bankruptcy Act (11 U. S. C. A. 75(a)(10)); countersigns all checks drawn on depositories,

General Order No. 29 (11 U. S. C. A. 53); and follows a characteristically non-judicial procedure (see R. 148, 173). In relating the practice of bankruptcy courts in designating depositories, it has been said, "Usually the designation of depositories is made by a standing order of court and numerous depositories are appointed within the district. It is not customary for the court to make a special order designating a special depository for the funds of a particular case and when no special depository is designated the trustee will usually be permitted to make use of the depository most convenient to his place of residence," A. S. Woodman, op. cit. p. 51.

3.

THE DESIGNATED DEPOSITORY AND FUNDS IN ITS POSSESSION.

The position of the designated depository in the system sufficiently appears from what has above been stated. So far as receiving bankrupt estate funds, its conduct is controlled by the order of designation, other orders made by the bankruptcy court, and general law. It is amenable to summary order. Designated depositories are themselves officers of the court, *State of Kansas* v. *U. S. Fid. & Guar. Co.*, 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865; *State* v. *U. S. Fid. & Guar. Co.*, 210 Wis. 178, 246 N. W. 434; *Miller* v. *Batson*, 160 Miss. 642, 134 So. 567; *Perkins* v. *State*, 130 Miss. 512, 94 So. 460; *Board of County Comm'rs.* v. *Mason*, 38 Wyo. 1, 264 Pac. 93. Funds deposited with the depository are withdrawn from *custodid legis* and become simple debts of the bank, *Gardner* v. *Chicago Title & Trust Co.*, 261 U. S. 453; compare *Potter* v. *Fidelity & Deposit Co.*, 101 Miss. 823, 58 So. 713; *City of Parsons* v. *Fidelity & Deposit Co.*, 29 F. (2d) 417 (D. C. Kan.), rev'd. on other grounds 43 F. (2d) 315 (C. C. A. 10); *In re State Treasurer's Settlement*, 51 Neb. 116, 70

N. W. 532, 537. The depository is responsible for any loss which may arise if it permits a receiver or trustee to withdraw bankruptcy funds by a check that is not countersigned by the bankruptcy court, *In re Singer Furniture Corp.*, 47 F. (2d) 780 (D. C. N. Y.).

In England and Canada bankruptcy funds are handled through a depository system similar to that existing under federal law, *Williams Bankruptcy Practice*, 14th ed., London, 1932, p. 395; *Bankruptcy in Canada*, Duncan and Reilley, 2d ed., Canadian Legal Authors, Ltd., p. 373.

C.

A Fiduciary or Public or Quasi-Public Officer Who Deposits Funds Under a Depository System, is not Liable for Their Loss Through a Closing of the Designated Depository.

The depository system in bankruptcy is similar in its essential features to the systems involved in the third class of cases above mentioned, pp. 38-40, where the rule of non-responsibility was applied.

In *Town of Hamden* v. *American Surety Company of New York*, 9 F. Supp. 733 (D. C. Conn.), the court discussed the federal depository system provided by the Acts of Congress, and, in comparing it with the local depository system there under review, said, p. 738:

> "• • • under the federal system although 'all public officers of whatsoever character, are required to keep safely, without loaning, using, depositing in banks • • • all the public money collected by them, or otherwise at any time placed in their possession and custody' (31 U. S. C. A. Sec. 521), at the same time the federal law affirmatively requires every disbursing officer (31 U. S. C. A. Sec. 492), and indeed

'every person who shall have moneys of the United States in his hands or possession' (31 U. S. C. A. Sec. 495), to deposit the same with or pay the same to 'the Treasurer or a depositary of the United States'; the same to be designated in conformity with 31 U. S. C. A. Sec. 476. This latter statute, together with 12 U. S. C. A. Secs. 391 and 392, to which it refers, authorizes the Secretary of the Treasury to designate any of the Federal Reserve Banks as depositories and fiscal agents of the United States. And as such depositories, they may be required to give security for the public funds received. 12 U. S. C. A. Sec. 90.

It thus is inherent in the federal system that federal funds coming into the hands of a receiving officer, when once deposited with a duly designated depository of the United States, are in effect in the treasury of the United States and hence no longer in the possession or custody of that receiving officer. See *Branch* v. *U. S.*, 100 U. S. 673, 25 L. Ed. 759. And the same situation exists with reference to public funds on deposit with a federal depository awaiting disbursement by any official disbursing officer. Thus, in the ordinary case no question can arise as to the liability of a federal receiver of public moneys or of a federal disbursing officer, for funds deposited with a duly designated depository.'"*

Petitioners' brief, pp. 30-31; refers to several decisions of this Court in which a public officer was held liable

*The secretary of treasury of the United States may designate national banks as federal depositories, 12 U. S. C. A. 90, and banks so designated are required to make annual reports to the secretary concerning federal moneys deposited with them, 31 U. S. C. A. 153.

under the insurer rule (p. 37, *supra*) for a loss of funds in his possession as officer. These decisions involved no deposit in a bank whether a designated depository or otherwise.

The necessity for examining the character of administrative system set up, when determining the responsibility of the fiscal officer, was commented on in *Town of Hamden* v. *American Surety Co., supra,* as follows, pp. 738-739:

> "Necessarily the liability of such an official will depend on state statutes, if such exist; and in the absence of statute, on the common law of the state which in large measure must be deduced from the administrative system of the state.
>
> Indeed, this underlying principle that the liability of a state official depends upon the local law is the source of much of the confusion on the subject-matter. For the many variations in the administrative systems of the several states necessarily lead to different conclusions as to their respective policies; in some states, as in the federal government, the statutory structure of administration is such as to compel the conclusion that the common-law liability of a public custodian has been impliedly modified; in others no such conclusion is justified."

In *City of Scranton, Pa.* v. *Aetna Casualty & Surety Co.*, 11 F. Supp. 986 (D. C. Pa.) the surety company was sued on the official bond of a city treasurer conditioned upon the faithful performance of his official duties and his turning over to the city at the end of his term of office all city property coming into his possession. The complaint charged that the bond had been broken by the failure of the treasurer to pay over at the end of his term moneys which had come into his hands as treas-

urer. The defendant pleaded that the moneys had been deposited in two banks duly designated by the city council as depositories for city funds, that these moneys never again came into his possession and that they had been lost in a closing of the banks. Under Pennsylvania statutes, city treasurers were required to deposit city funds in banks designated as depositories by the council, to make disbursements only by warrant countersigned by the city controller, and to make daily reports to the controller of all receipts, deposits and withdrawals of such funds. The court held the defense sufficient in law, saying, pp. 988, 989:

> "The treasurer's duty to deposit daily the receipts of his office in banks selected by council is a mandatory requirement not contained in any acts under which treasurers and collectors have been held to be responsible for public moneys coming into their hands, and that feature distinguishes the case at bar from those cases where it has been held that the treasurer is an insurer. * * * In *Hinton* v. *State of Oklahoma*, 57 Okl. 777, 156 P. 161, 163, it was held: 'It is well settled by authority and on principle that, when such depositories have been designated according to law, neither the county treasurer nor his bondsmen are liable for the loss of funds deposited therein, so long as the treasurer keeps within the requirements of the law.' * * *
>
> The plaintiff contends that the city treasurer cannot be released from liability in the absence of an expressed provision in the statute that a compliance with the act will relieve him from such liability. With this contention I cannot agree. Such expressed provision is not necessary to accomplish the same result.

In *Edgerton Independent Consol. School District v. Volz*, 50 S. D. 107, 208 N. W. 576, 578, the court said: 'It is clear, upon principle and authority, that, if the school district had been authorized to designate, and had designated, said bank as the depositary, then the failure of the bank would have relieved the treasurer from liability for the amount on deposit. In many depositary acts in this and other states it is expressly provided that a compliance with the act will relieve the treasurer from such liability, but such express provision is not necessary to accomplish the same result.' * * *

The contention of the plaintiff is without precedent in Pennsylvania. The state did not make it the duty of treasurers * * * to deposit the public moneys in banks selected by city council, and, at the same time, impose losses due to failures of the depositories upon the treasurers."

In *American Surety Co. of New York* v. *City of Thomasville*, 73 F. (2d) 584 (C. C. A. 5), suit was brought by the city against a surety on its treasurer's official bond to recover the amount of city funds deposited by the treasurer in three banks which failed in the years 1932 and 1933. The bond was conditioned upon the faithful discharge by the treasurer of his official duties. The city ordinances provided that the treasurer was to receipt for, keep and pay out city funds "as authorized by" the city council, and directed the treasurer to make deposits in the three banks designated as depositories therefor. The Circuit Court of Appeals for the Fifth Circuit in reversing a judgment on a verdict directed below for the city, said, pp. 586, 587:

"In Georgia, as generally elsewhere, it is held that a public official intrusted with public moneys is bound

to keep them safely at all events, and is not excused for losses unless perhaps when caused by the act of God or the public enemy. * * * It must be, however, that, if by competent authority public funds are authorized or required to be deposited at a particular place or on particular terms, the official holding them will be protected in so dealing with them. It is no possible breach of duty for him to do so. In Georgia, since 1879, under legislative authority banks have been designated by the Governor to act as depositories of the state's funds. * * * Since then such depositories have been quite commonly authorized and used; the public funds in most cases drawing interest as for a loan while on deposit. In 1933 * * * all public officers were required to deposit public funds in public depositories. It is thus evident that for many years the public policy of the state in this regard has been changing. The original idea of making the official the only custodian of the funds has been yielding to the idea of using them to make interest by depositing them in solvent banks under such safeguards as might be thought necessary.

That what the Legislature itself directs is a protection to an obedient officer no one would question. * * * By so depositing * * * [the moneys in the designated depositories] the treasurer cannot be said to have done contrary to his duty or to have breached a bond conditioned for the faithful performance of it." (words in brackets added)

In the early case of *Perley* v. *County of Muskegon*, 32 Mich. 132, 135, the Supreme Court of Michigan discussed the rule as follows:

"The position of a public officer is peculiar, and the differences in different systems of statutes show

that the responsibility is not by any means uniform. * * * The usual rule in regard to bailments exonerates the bailee who has done all that was in his power to prevent loss or accident, and there are authorities which on this ground discharge public treasurers from any greater liability. There are others which hold them to be debtors, and not bailees, and not exonerated under any circumstances.

* * * If an officer is required or authorized by law to make deposits in any particular place or with any particular person, he is usually, if not universally, protected from any further responsibility, so long as he leaves it there."

In *Board of Education* v. *Nelson,* 33 N. D. 462, 157 N. W. 664, 665, 666, 667, the treasurer of a school district and his sureties were sued on his official bond to recover school moneys deposited in one of the depositories designated by the board and lost when the depository failed. The amount deposited was in excess of a depository bond furnished by the depository. The Supreme Court of North Dakota held that the treasurer and his sureties were not liable, saying:

"By chapter 105 of the Session Laws of 1905 a complete and comprehensive depositary plan was enacted. * * * Instead of the old relationship of liability of the official to the municipality, the Legislature has seen fit to declare it to be the better policy to substitute a relation of debtor and creditor as between the bank and the municipality. By section 1481, C. L. 1913:

'All funds of the city or school district shall be deposited in the name of the city or school district by the city treasurer or treasurer of the school district,

as soon as received by him, in such bank or banks as shall have been designated as city or school district depositaries.'

* * * Section 1484 provides that:

'All checks drawn upon the city or school district depositaries shall be signed by the city or school district treasurer in the name of the city or school district, by himself as treasurer.'

* * * If this money has been deposited in a depositary, the school district has, in the language of the opinion in *Re State Treasurer's Settlement,* 51 Neb. 116, 70 N. W. 532, 36 L. R. A. 746, in legal effect made—

'a loan of such moneys to the bank, and the relation of debtor and creditor is thereby created, not between the bank and the treasurer, but between the former and the * * * (school district), since the money thus deposited belonged to the * * * (school district), and not to the treasurer, its agent and representative. * * *'

* * * And of course the Legislature has plenary power to prescribe the liability of its officials for the funds of it or its municipalities. The state could not elect to loan its money, or that of its municipality, to a bank, as here done, under the depositary law, and compel the treasurer, as its representative, under criminal penalties to create such relationship, he having no voice in the selection of the depositary, and at the same time hold him as an insurer of the state's debtor, the bank. * * * The state has * * * chosen to depart from any absolute or limited theory of the officer as insurer, and has substituted therefor the liability of its depositary, assuming rather to take

the risk of the latter than of the official as to ability to respond for public funds. * * *

* * * The responsibility rested, not with the treasurer, but with the board, when the former followed the written orders of the latter. * * *

It is not the treasurer's duty to select depositaries, but instead to comply with the orders of the board to deposit where that body having the power to designate depositaries has directed the deposit to be made. * * * Neither the power nor the resulting responsibility to designate can be divided between the treasurer and the board, and it is not so divided by statute. * * *

The duty to require additional [depository] bonds was upon the board. * * * The responsibility for the loss is not with the defendant treasurer, as he had no option in the matter but to comply with the orders of the board. * * * The defendant had the right to presume that the school board had performed its duties." (word in brackets added)

In *Benson* v. *American Surety Co. of N. Y.*, (Minn. 1937) 271 N. W. 125, 126, recovery was sought of the city treasurer for city funds lost in a failure of the designated depository. The city charter exempted the sureties on the treasurer's bond in the event of a loss of funds through such failure, but was silent on the liability of the treasurer. In holding the treasurer not liable, the court said:

"True, this provision of the charter does not, in specific language, absolve the city treasurer from liability for funds deposited in designated depository banks pursuant to the said charter provision, but it stands to reason that when the treasurer has parted

with the possession and custody of the funds in obedience to law he should no longer be responsible for the same."

In several cases, the question of whether the depositing officer is required to determine the condition or stability of a depository bank has come before the court in a challenge by the officer of the designating authority's power to compel him to deposit in a bank other than one of his own choice. In *Stephens* v. *City of Ludlow,* 159 Ky. 729, 169 S. W. 473, 475, the city treasurer filed a petition to enjoin the city council from enforcing an ordinance requiring him to deposit city funds in a depository designated by the council. The treasurer contended that under state statute he was responsible for their safekeeping and should have the discretion where deposits should be made. The Kentucky Court of Appeals affirmed a judgment below which sustained demurrer to the petition, saying:

"* * * There would, of course, be great force in this argument if the treasurer were an insurer of the solvency of the depository selected by the city, but he is not. * * * when * * * the selection of the depository is taken out of his hands, and he is directed by the city to keep its funds in an institution selected by it, the city, and not the treasurer, assumes responsibility for the integrity and solvency of the institution so selected." * * *

Under like circumstances, it was said in *Magee* v. *Bristow,* 109 Miss. 183, 68 So. 77, 78:

"It will be sufficient to say that this [depository] law has also materially modified the duties of county treasurers * * * and no liability growing out of the receipt and disbursement of county funds can attach

to a county treasurer who has complied with the provisions of the depository law." (word in brackets added)

And in *Board of Finance* v. *First National Bank*, 71 Ind. App. 290, 124 N. E. 768, 771-772, the court stated:

"When the judge of the Circuit Court [designating authority] approved the bond and designated the bank a depository, the Board of Finance [depositing officer] was * * * relieved." (words in brackets added)

The opinion in this case comments on activity of the court as a designating authority in the following words, p. 770-771:

"But judges do not always act in their judicial capacity. It seems that the Legislature is permitted to call upon judges to perform acts which are not judicial, but which are purely ministerial, executive or administrative * * *.

We are of the opinion that the Legislature did not intend that [when the court acted, in designating a depository] there should be an adversary proceeding under the code, requiring issues, trial, finding and judgment; and did not intend that this function should be performed by the judge in his judicial capacity. What is presented to the judge is more in the matter of a business proposition than a civil action." (words in brackets added)

Also: *City of New Haven* v. *Fresenius*, 75 Conn. 145, 52 Atl. 823, 825; *Joint School District No. 105* v. *First National Bank*, 125 Okla. 243, 257 Pac. 318, 319; *Miller* v. *Batson*, 160 Miss. 642, 134 So. 567, 572; *City of Newburgh* v. *Dickey*, 150 N. Y. S. 175, 178, 164 App. Div. 791.

In some jurisdictions the rule announced in the above cases has found its way into an express statutory provision of exoneration, *State* v. *Bowers*, 26 Oh. Cir. Ct. 326, aff'd. 70 Oh. St. 423, 72 N. E. 1155. However, express statutory exoneration is unnecessary. See particularly *City of Scranton, Pa.* v. *Aetna Casualty & Surety Co., supra*, 11 F. Supp. 986, 988 (D. C. Pa.).

Petitioner's brief, p. 21, cites *Jordon* v. *Baker*, 252 Ky. 40, 66 S. W. (2d) 84; *Edwards* v. *Logan County*, 244 Ky. 296, 50 S. W. (2d) 83; and *State* v. *McNamer*, 62 Mont. 490, 205 Pac. 951, as supporting the proposition that an official required by statute to deposit in a particular depository, may, nevertheless, be held responsible for funds lost in the closing of the depository. In the *Jordon* case, it was held that mandamus would lie to compel the issuance of a quietus to a fiscal officer who had deposited county funds in a designated depository which failed, and that decisions applying the insurer's rule would not be followed. By way of *dictum*, it was suggested that knowledge in the officer warranting him taking action with respect to deposits might amount to "that degree of negligence" rendering him liable as a bailee. Three months after the *Jordon* case was decided, the Kentucky legislature enacted into legislation, Ky. Acts, 1934, c. 22, the general rule of non-responsibility which the Kentucky court in the earlier case of *Stephens* v. *City of Ludlow*, p. 57 *supra*, 159 Ky. 729, 169 S. W. 473, had announced. The *Edwards* case was concerned with a judgment below based upon the insurer's liability rule. On appeal, the judgment was reversed for new trial, the court pointing out that when the bank was designated a depository and the officer was directed to deposit the funds there and he obeyed, the designating authority "assumed responsibility for the integrity and solvency of the institution and exonerated him from loss of funds

if suffered solely on that account," *ibid,* 50 S. W. (2d) p. 86. *State* v. *McNamer,* 62 Mont. 490, 205 Pac. 951, held that where the county collector was under duty to pay over city funds to the city treasurer as promptly as they were computed but failed to do so, and instead permitted them to remain on deposit in a designated depository, liability for his failure to make prompt turnover might be imposed, the court saying, p. 953:

> "If he deposits the city's money in the designated depository or depositories, and before he has had time to ascertain the amount he has collected for the city a loss occurs, such as in this case, he would no doubt be protected, but after the necessary time for making such computation elapses, to say that he would be relieved of the duty of paying over to the city such money so collected, would in a sense be allowing him to take advantage of his own wrongful conduct."

As a corrollary to the rule of non-responsibility, it is held that where a bond is required by law of the designated depository to secure deposits, the fiduciary or depositing officer is under no duty to inquire into the amount or sufficiency of such bond if the amount is fixed and terms approved by some one other than the fiduciary or depositing officer, *Town of Lakeland* v. *Ballmer,* 209 Wis. 636, 245 N. W. 682, 683; *Board of Education* v. *Nelson,* 33 N. D. 462, 157 N. W. 664, 667; *City of Billings* v. *Miss. Bonding & Ins. Co.,* 88 Mont. 91, 290 Pac. 246; see *City of Missoula* v. *Dick;* 76 Mont. 502, 248 Pac. 193, 195; *Illinois Surety Co.* v. *United States,* 226 Fed. 665, 667 (C. C. A. 7). Petitioners distinction, p. 28, of the *City of Billings* case as involving an express statutory exoneration is not wholly accurate. The exoneration clause involved contained no provision with respect to deposits in excess of the depository bond, and accordingly, the question was there raised and considered.

Petitioners' brief, pp. 36-37, cites seven cases, commencing with *State* v. *U. S. Fidelity & Guar. Co.*, 210 Wis. 178, 246 N. W. 434, in support of the proposition that "if the officer having charge of making deposits places larger sums in the depository [designated] than the amount of the depository bond", the officer is liable as an insurer for the amount deposited in excess of the depository bond. None of these cases supports such rule. *State* v. *U. S. Fidelity & Guar. Co., supra; Roberts County* v. *Wickard*, 53 S. D. 511, 221 N. W. 246; *Mass. Bonding & Ins. Co.* v. *Steele*, 125 Neb. 7, 248 N. W. 648, and *Board of Comrs.* v. *Soucek*, 128 Okla. 151, 261 Pac. 947, each was concerned with an express statutory provision limiting the amount of the deposits to a percentage of either the penal sum of the depository bond, or the capital of the bank, etc. In *State* v. *Carney*, 208 Ia. 133, 217 N. W. 472, and *Anderson* v. *Peterson State Bank*, 191 Minn. 404, 254 N. W. 459, a statute expressly provided that the penal sum of the depository bond should be in excess of deposits, and such provision was interpreted as prohibiting deposits in excess of the depository bond. *Cheyenne* v. *Maryland Casualty Co.*, 13 F. (2d) 401 (D. C. Wyo.) is without relevancy. Of course, neither the Bankruptcy Act nor General Orders contains any provision restricting bankruptcy deposits to the amount of the depository bond.

D.

Policy of the Rule in Bankruptcy.

It is evident that the depository system provided in the Bankruptcy Act for the safekeeping of bankruptcy funds is the same type of depository system which was involved in the third class of cases heretofore discussed where the rule of non-responsibility was applied to the depositing officer. The three essential features of that system are pres-

ent: the depositing officer cannot retain the funds in his possession or place them where he chooses; he must deposit them in a designated depository; the power to select and designate the depository, revoke the designation and approve a new depository, is lodged with another person. Indeed, the position occupied by the trustee or receiver in bankruptcy in relation to funds in safekeeping is much more servient. He is burdened with the duty of preparing and filing periodic reports to the designating authority of the amounts on deposit in the depositories; he is subject to summary order of the designating authority; his disbursing power can be exercised merely with respect to funds actually on deposit in the depository, and then, only by countersigned draft. This role is certainly different from that of the public officer who could, if he wished, put official funds in his own pocket and was held to an insurer's liability if the funds were lost in a bank failure, p. 37; or the common law fiduciary making deposits of the funds in such bank as he chose and withdrawing them at will, who was held liable for a loss if he failed to observe ordinary care and prudence for their safety, p. 38. The removal from the trustee or receiver in bankruptcy, within the ambit of his office, of any discretion with respect to the safekeeping of bankruptcy funds in a designated depository, reasonably leads to a removal of responsibility for their loss while on deposit.

Petitioners' brief in several places, pp. 15-16, 8, 18, 51, sounds a *caveat* that if the rule stated in the opinion below be followed, bankruptcy funds will be placed in jeopardy. Petitioners, however, ignore the theory of security underlying depository systems. Protection of funds pending payment, administration or distribution is sought not in any individual discretion or control over them by the officer into whose possession the funds come and the corre-

lative imposition of liability in the event of his negligent handling thereof, but in the provision for depositories and for the independent and exclusive exercise of the various administrative functions over them with which the authority that is empowered to select and supervise them is charged. It is true that the system in placing these functions with the bankruptcy court has removed them from the trustee or receiver. It does not follow, however, that bankruptcy deposits are faced with catastrophe. Greater security is ultimately achieved in resting with an independent authority, investigatorial and supervisory powers over places of deposit for all bankruptcy funds in the district. While trustees and receivers are expected to administer their estates with great care and trust, the matter of safekeeping funds in banking institutions has been taken away from their concern, at least to the extent that they are not under a duty of care to ascertain and then judge under risk of civil liability, the condition and stability of the designated depository in which they deposit the funds. There is a high public policy in having controversies over places where bankruptcy funds shall be deposited, decided not by such officers, but by the court.

E.

The Rule of Non-Responsibility is not Affected by the Number of Banks Qualified as Depositories in the District, Assuming Such Question were Before this Court; Nor Does the Rule Present any Issue Under the Fifth Amendment.

Petitioners' brief, pp. 16, 27, 36, contends that where several banks, rather than one, have been qualified as bankruptcy depositories within the district, the rule of non-responsibility is inapplicable, and, instead, there is imposed upon the trustee or receiver in such case a duty to consider, with care, whether the particular depository in

which he makes or maintains deposits is one which an ordinary prudent person would have selected if given as a class for choice, the various depositories qualified. Thus, petitioners assert, in effect, that the trustee or receiver has a duty to evaluate the respective financial condition and position of the various depositories, to inquire into such matters as the relation between the size of the depository bond of each depository and the total amount of bankruptcy deposits in all the various estates which he individually administers. And, presumably, he must ascertain and determine the amount of estate funds deposited and maintained on deposit in each of the depositories from time to time by all of the other receivers and trustees in the district. In their argument, p. 16, petitioners point to twenty-one different banks qualified as depositories when the first deposits were made in 1930 and say that "at all times thereafter * * * there were a substantial number of such depositories". Petitioners criticize, p. 27, the opinion below for an "intimation" that Howard had no power of selection, asserting that "it is an undisputed fact" that at all times "he had numerous qualified depositories to choose between".

Under the depository system in bankruptcy all depositories are in law upon an equal footing. Each is designated by the bankruptcy court and continues under its supervision; each is an officer of the court and subject to summary order. In the nature of the system no duty exists for the trustee or receiver to exercise an individual discretion as to the relative security of the depositories and, in effect, to review the judgment of the designating authority at the risk of being held liable for negligence. Section 61 of the Bankruptcy Act (11 U. S. C. A. 101) in empowering courts of bankruptcy to designate depositories provides among other things that depositories so

qualified shall be located as convenient as may be to the residences of the trustees. This is a clear legislative recognition that trustees and receivers may be guided in making deposits by considerations wholly of convenience and they are not expected to make appraisements in matters of qualification or stability.

Not only is there no requirement in law that a judgment be exercised to select among depositories, the record in this case fails to present the question for review. The only proof offered by petitioners with respect to the other depositories was an enumeration of banks located in Cook County, Illinois, which had had depository bonds on file in the District Court at some time between August 1, 1930 and June 21, 1932, and of the respective amounts, and changes in amounts, of such bonds (R. 112-113).* No proof was ever offered by petitioners that any of these depositories was in a safer condition at that time than the Phillip State. No proof of the relative safety of the depositories was ever made. The record is silent on such questions as whether the other depositories had experienced runs at the time the Phillip State experienced them, what was the state of their financial condition, what was the relationship between the amount of the depository bond of each depository and the total amount of the bankruptcy funds deposited in such depository by all receivers and trustees, what was the reputation of each of these depositories, did they have any affiliation or relationship with other banks which would tend to give them

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*This evidence was admitted over respondents' objection that the complaint had not averred, in support of its charge of alleged negligence, the existence of other depositories, and that respondents' motion to dismiss the complaint, urging among other reasons the failure so to allege, had been overruled (R. 107-112, 32, 35, 318).

strength in the event they were met by a run. Indeed, other portions of the record indicate that these depositories were far from stable. Two of them failed on June 8, 1931 (R. 138, 113). Two others, both "loop" banks, merged with two others to save the deposits in the former banks (R. 120-121, 112-113). Prior to that time, and during the period under review, another, The Chicago Trust Company had merged (R. 112). Moreover, certain exhibits offered by respondents and excluded by the trial court, showed that each of the two mentioned "loop" depositories had had a depository bond of $50,000, although the respective amounts of their bankruptcy deposits were $1,103,783.32 and $331,333.76 (R. 157, 113).

As heretofore stated, the trial court rejected an offer by respondents to pursue a line of proof showing the respective financial position or strength of the depositories, and, further, prohibited counsel for respondents in their argument to the jury to refer, as of common knowledge, to the general banking situation in Chicago, the district and the country (R. 277, 290-291). From an official report, *Statement Showing Total Resources and Liabilities Of Illinois State Banks—at the close of business June 29, 1935,* compiled by Edward J. Barrett, Auditor of Public Accounts for the State of Illinois and printed under authority of that State, of which report judicial notice may be taken, (*McCrary* v. *Schenebeck,* 191 Ark. 698, 87 S. W. (2d) 572, 574) it appears that nine other of the depositories closed either during the period reviewed or within nine months thereafter, and that two of the depositories, (State Bank of Chicago and the Union Trust Company) had merged with other banks prior to the period under review (R. 112, 113, p. 28 of said report).* Also one of the depositories (Oak Park Trust & Savings Bank of Oak Park, Illinois) was not located

*See footnote, p. 17, *supra.*

in Chicago but in a suburb, and had been designated a depository less than a month before the Phillip State closed (R. 113).

Thus, of the designated depositories existing at some time during that period, five-sevenths either failed or were compelled to merge with others.

In view of the record as above set forth, the issue of selection of designated depositories, were it material in law, is not presented.

Petitioners' brief, pp. 42-44, after describing the opinion below as an "exoneration" of the trustee or receiver "without regard to his negligence or lack of good faith in making and maintaining deposits", contends that such a "release" from "direct negligence or malfeasance" violates rights guaranteed them under the due process clause of the fifth amendment. An examination of the opinion below shows that nothing was stated therein concerning lack of good faith or malfeasance but that the court merely held that where suit was brought on a trustee's or receiver's bond to recover the amount of funds lost in the closing of a designated depository, on the theory that the trustee or receiver had failed in an official duty to examine, ascertain and judge, with care, the financial condition and stability of the bank when depositing, or maintaining deposits of, the funds there, such action was ill-conceived for the reason that the supposed duty was not one imposed by law on the officer and covered by the bond (R. 393-402).

It is self-evident that no constitutional issue is here presented. Indeed, the question which petitioners urge was raised for the first time in their petition for certiorari. Petitioner's statement, p. 42, that the constitutional question "arises because of the opinion of the Circuit Court in the instant case", does not explain their failure to present the question in their petition for rehearing filed in that court.

The proposition that petitioners are being deprived under the decision below of their right to recover for negligence, and hence of their constitutional guarantee, errs among many reasons in its assumption of the supposed official duty. The cases in the note in 38 A. L. R. 1512, to which petitioners refer, are so clearly inapplicable that no discussion is required. The rule quoted from Cooley relates to "vested" rights.

III.

NO QUESTION OF FRAUD, CORRUPTION, MALFEASANCE OR BAD FAITH IS PRESENTED FOR REVIEW.

Petitioners' brief is not limited in its discussion to whether Howard was under an official duty, within the meaning of the bonds sued upon, to determine, with care, the stability of the Phillip State when making and maintaining deposits there, and whether, assuming such duty existed, he had been negligent in that regard. Petitioners assail Howard, pp. 5, 11, 15, 18, 20, 26, 34-39, 50, as being guilty of "corruption", "fraud", "malfeasance" and "bad faith" in his handling of the funds. Their brief pivots about these accusations.

It is unnecessary to inquire at any length into the merits of these charges. Petitioners are seeking a judgment by this Court upon matters of fact and law which are not presented for review. The case was tried in the District Court wholly upon the theory that liability could be imposed under the bonds for "negligence". The complaint and answer which were filed joined issue on whether Howard negligently and carelessly deposited and maintained on deposit in the Phillip State the bankruptcy funds involved, and negligently and carelessly permitted them to remain there (R. 8, 9, 10, 41-42). The evidence which was introduced by both petitioners and respondents related

to the issues as thus joined, and the case was tried and the jury charged on that basis (R. 299). Respondents were not asked to meet nor was the jury asked to decide any charge of corruption, fraud, malfeasance or bad faith.

It is a fundamental principle of judicial review that if a theory of liability tried below differs from that urged on appeal, to such a degree that the decision upon the one would not necessarily conclude the other, the one raised on appeal cannot be considered; that a theory of liability contended for on appeal which rests or may rest on fact issues never submitted to the jury will not be reviewed; that if a party has brought and tried a case on one theory, he will not be permitted on review to change to another which his opponent was never required to meet, *Virginian Ry.* v. *Mullens,* 271 U. S. 220; *cf. Dewey* v. *Des Moines,* 173 U. S. 193.

Petitioners' charges of fraud, corruption, etc., a matter shortly to be discussed, for the most part relate to the loans made by the Phillip State to Howard, pp. 4-7, *supra.* It will be noted that the evidence of these loans was introduced by petitioners, and admitted by the trial court, as proof supporting the theory of "negligence". The complaint alleged that by reason of the loans, Howard had not exercised "reasonable care, prudence and caution" with respect to the deposits in the Phillip State (R. 9, par. 14). The answer denied that because of the loans, or otherwise, Howard had failed to meet the general standard (R. 42, par. 18). The trial court stated in charging the jury that proof of the loans was relevant as showing that Howard, by so borrowing, had "fettered" his judgment and prevented himself from "interpreting things that occurred" of significance in considering the condition of the bank, and from "being impressed" by such occurrences, as a "reasonably prudent man" might have inter-

preted or been impressed (R. 298-299). Respondents objected to the admission of proof of the loans and took exception to the statement of the court, on the ground, among others, that assuming petitioners' theory of the existence of the supposed duty were sound, the evidence did not tend to show *whether* Howard had conformed to the general standard of due care in considering the condition of the depository, but *why* he may not have. See pp. 96-100, *infra*.

Petitioners' argument that Howard had been guilty of fraud, corruption, bad faith, etc., in the performance of his duties apparently reduces itself to this: that Howard entered into a "corrupt" agreement with the officers of the Phillip State to the effect that, p. 17, "in consideration of transferring and depositing his bankruptcy funds in the Phillip Bank, said Bank would make to Howard, personally, unsecured loans sufficient to pay unsecured loans which he then had with the Foreman Bank and the Central Trust Company, and, in addition, would give him further unsecured loans"; that such agreement was one, p. 17, "solely for his personal benefit"; and that because of the loans and agreement, Howard experienced throughout the period, p. 17, "mental limitations" which interfered with his exercising, p. 18, "discretion in selecting between depositories", that is, limited, p. 20, "his power to act", or, p. 36, "his freedom of action".

Petitioners' argument errs in many respects. Its assumption that the bonds sued upon cover a duty to select among designated depositories, begs the question. Its assertion of the making of an agreement to extend loans in consideration of a deposit of bankruptcy funds, is inaccurate characterization. Inasmuch as the facts in this connection have been fully set forth heretofore, pp. 3-7, they will not here be restated.

The basic fallacy of the argument, however, lies in its assumption that the so-called "personal" loans made to Howard by the Foreman Bank, Central Trust and Phillip State were for his individual gain and advantage. Petitioners directly refer to the agreement with the Phillip State as having been, p. 17, "solely for his personal benefit" and imply that the loans from the other two banks were likewise. In the trial court, upon motion or objection of petitioners, respondents were not permitted to show to the jury the purpose for which these loans had been made (R. 207, 208, 223, 229-230, 251-252, 254, 258-259). The basis for the exclusion was immateriality (R. 230). Yet, in this Court, petitioners are resting their argument of corruption, fraud and bad faith upon the supposition that the purpose for which the loans were made involved Howard's personal gain. Howard's loans outstanding at the Foreman Bank and Central Trust, in August, 1930, had been made for the benefit solely of the estates which he administered as trustee or receiver, and the money there borrowed was used to furnish the estates with cash needed for the payment of services rendered by various persons to them (R. 229-230, 258-259, proof offered). Part of the money borrowed from the Phillip State was used in connection with transferring the Foreman and Central loans to the Phillip State, and all of the remainder was used, like these loans, not for Howard's individual use but wholly for the benefit of the estates, money which was kept in a special revolving account and employed in making petty cash advances to the estates in order to meet and pay estate expenses recurring in the course of administration, such as custodian service fees, mimeographing and stenographic fees, insurance, postage, bookkeeping and inventory service fees, etc. (R. 207, 208, 223, 230, 251-252, 254, 258, proof offered). Under the

practice prevailing in the bankruptcy district and approved by the bankruptcy court, trustees and receivers regularly provided the funds for the making of such advances and were allowed reimbursement therefor out of the estates upon approval of their reports by the court (R. 254, proof offered). The loans by the Phillip State to Howard were usual bank loans, bearing the regular rate of interest, made upon the personal financial statement of Howard, and approved by the directors and loan committee of the bank (R. 168, 169, 174, 258). While the loans were personal in the sense that Howard individually bound himself for their repayment, they were not personal in the sense that they were made, as petitioners contend, for his individual gain. The money was borrowed in the interest of efficient and thrifty management of the estates and to avoid continuous petitioning of the bankruptcy court for allowances. One court, in speaking of moneys borrowed by common law trustees for the benefit of their estates, said "it is no answer to say that they could have applied to the court to borrow such funds each time the necessity arose to do so in order to carry on operations", *Purdy* v. *Bank of America*, 2 Cal. (2d) 298, 40 Pac. (2d) 481, 482.

Petitioners' brief, pp. 38-39, strikes out on a different tack. It argues, p. 38, that Howard "used his power over the estates" to obtain "presently a portion of the commission to which he anticipated that he would ultimately be entitled," that these 'anticipated commissions" were "carefully estimated" in connection with determining the amount of loans to Howard. The precise import of this argument is unclear. The record shows that the Phillip State requested Howard to furnish a financial statement before lending the money needed for the estates, that contrary to petitioners' previous contention of an "agree-

ment," the bank extended the loans only upon a showing of Howard's personal wealth. Although the money was borrowed for the estates and would ultimately be repaid in the usual course of administration, Howard was required to pledge his personal credit therefor, a pledge that has proved costly to him (R. 206-207). The financial statement in question showed real estate and some fifteen or sixteen thousand dollars owed Howard on account of advances to, and estimated earnings by way of commission in, various bankrupt estates administered by him.* Loans of this kind had the regular approval of the Chicago Clearing House Association (R. 174). Petitioners evidently find something unconscionable in the financial statement submitted.

IV.

THE RISK COVERED BY THE BONDS DID NOT CONTEMPLATE THE SOLVENCY OF ANY DESIGNATED DEPOSITORY IN WHICH A TRUSTEE OR RECEIVER MAY HAVE DEPOSITED BANKRUPTCY FUNDS.

No surety could reasonably believe in considering the risks assumed by it on a trustee's or receiver's bond that in a real sense it was underwriting the solvency of all designated depositories in the district, at least to the extent of bankruptcy funds there on deposit in excess of the respective depository bonds. If in computing the extent of its risk the surety examined the Bankruptcy Act and General Orders for the purpose of ascertaining the character of duties imposed upon a trustee or receiver in respect to his handling of bankruptcy funds, it would find merely that such officer was under a mandatory obligation to place the funds in a designated depository. On

*Commissions and fees of a receiver or trustee are fixed by statute as to their maximum limits.

further inquiry into the law, it would observe that the risk of loss had been taken over by a depository system in which an authority other than the trustee or receiver selected banking institutions for the deposit of bankruptcy funds, passed upon their qualifications, took depository bonds from them, limited if necessary the amount of deposits which such banks could accept and, in general, exercised a continuing supervisory power over them.

With this the law, the surety in bonding a trustee or receiver in bankruptcy could reasonably rely on the depository system as controlling its risk and assume that it was not undertaking that officers or administrative bodies other than the receiver or trustee were properly judging of the safety and stability of the various designated depositories. Petitioners' brief, p. 20, comments upon the fact that in one of the estates only a $1,000 trustee's bond was required although $132,707 of funds were in the estate. Only on petitioners' theory of risk does this fact seem extraordinary; moreover, the amount of the trustee's bond is fixed by creditors of the particular estate, Section 50(c) of the Bankruptcy Act (11 U. S. C. A. 78(c)).

The Circuit Court of Appeals in its judgment below reversed the judgment in the District Court and ordered a new trial of the case. The Circuit Court of Appeals held that the bonds sued upon did not cover the supposed risk and that consequently the action brought had been ill-conceived. It is respectfully submitted that this judgment was proper and that this Honorable Court should affirm. Should this Court so hold, a consideration of the points hereinafter set forth will be unnecessary.

V.

IF IT BE ASSUMED THAT A TRUSTEE OR RECEIVER IN BANKRUPTCY, IN MAKING OR MAINTAINING DEPOSITS OF BANKRUPTCY FUNDS IN A DESIGNATED DEPOSITORY, OWES A DUTY OF CARE TO GUARD AGAINST LOSS THROUGH A CLOSING OF THE DEPOSITORY, NEVERTHELESS, IN THIS CASE UNDER THE FACTS PROVED AND WHAT MATTERS THIS COURT MAY JUDICIALLY NOTICE, HOWARD VIOLATED NO SUCH DUTY.

In its opinion below, the Circuit Court of Appeals withheld decision on certain rulings of the District Court assigned as error by respondents. The opinion stated that in view of the conclusion which the Circuit Court of Appeals had reached, its decision on these other features was unnecessary (R. 402). These rulings were reserved by respondents for argument in this Court in the *Brief for Respondents in Opposition,* p. 30, filed when the case was here on petition for writ of certiorari, and petitioners in their brief on writ of certiorari have dealt with the questions involved, petitioner's brief, pp. 44-49.

This suit is not the usual one between common litigants. It is of much more serious portent. Without regard to whether the assumed duty be owed, Sam Howard stands at the bar accused of dereliction as an officer of the bankruptcy court and his reputation, standing and character are at stake. From this viewpoint, therefore, there is importance in showing that although it be not conceded that Howard was under the supposed duty, his conduct did not violate it, and the reversal of the judgment in the District Court by the Circuit Court of Appeals should be affirmed.

A.

Condition of the Bank.

The period under review commences with August, 1930 and ends with June 21, 1932. It was a period of great economic upheaval, pyramided failures in industry and banking, and general distress. What Howard in fact did at that time in relation to the safety of the deposits at the Phillip State cannot be compared with the abstraction what an ordinary prudent person would have done under like circumstances, unless notice be taken of the general economic condition and banking situation then prevailing. The verdict in the District Court may better be understood when it is observed that argument of counsel for respondents, in referring to the nature of the times, was interrupted by the court, and that later a direct instruction was given to the jury barring it from considering such matters (R. 289, 290, 291, 295). That the character of the times falls within the fund of common knowledge and experience which may be drawn upon equally by court and jury is well established.

In the case of *Great Northern Railway Co.* v. *Weeks*, 297 U. S. 135, 149, this Court speaking through the Honorable Justice Butler, said:

> "Judicial notice must be taken of the fact that late in 1929 there occurred a great collapse of values of all classes of property—railroads, other utilities, commodities and securities, and that the depression then commenced progressively became greater * * *."

The bankruptcy moneys for which recovery is sought were lost when the Phillip State closed its doors during the run of June, 1932. Prior thereto in the year 1931 three runs occurred at the depository which came to the

attention of Howard. It was proof of these earlier runs and Howard's knowledge thereof which formed the principal basis for submitting to the jury the question of his responsibility, under the assumed duty, and consequently that of his surety, for the loss (R. 298-300).

The occurrence of a run, some time before a bank's closing, may be material in determining liability for deposits made or maintained with knowledge of the run, and lost in a closing. A run places a depositor on inquiry as to certain possibilities affecting deposits which he should investigate. The run might mean that the bank was in an insolvent or unsound financial condition, or was experiencing other internal difficulty. Or it might mean that the bank, although perfectly solvent and sound at the time of the run, had become insolvent or financially unsound because of the very run. Or it might mean not past or existing insolvency or instability but merely in view of circumstances that future runs were possible.

The issue, whether or not Howard failed to exercise the supposed duty of care for the safety of the funds can in nowise be said to concern itself with a disregard of any condition of insolvency or financial instability of the depository. There is not a shred of proof that the depository was in an insolvent or unsound financial condition before or after the occurrence of the runs or at any time prior to its close. The quarter-annual financial statements issued by the depository during the period and filed with the State Auditor, and an audit made by petitioners' auditor in preparing for this lawsuit after the bank closed, are proof of solvency (R. 83-101, 139). The situation was that of a going solvent institution when met by the June, 1932 run. In this respect the case finds no counterpart in any of the numerous decided cases wherein liability was imposed upon persons—not officials who had deposited in

designated depositories—for funds lost in a closed bank. In all of these cases, the duty of care owed was violated by a careless disregard of an existing condition of insolvency or manifest financial instability. Typical are those involving bank officers in public office who kept public funds on deposit in their own banks when they knew them to be insolvent, *Thunder Hawk School District No. 8* v. *Western Surety Co.*, 58 S. Dak. 312, 235 N. W. 921.

The 1931 runs at the Phillip State Bank and Howard's knowledge thereof, if of any significance, show merely that Howard was placed on inquiry as to the possibility of future runs on the depository.

Thus, the issue, whether or not Howard failed to exercise the supposed duty revolves about this fact question: Because of the occurrence of the 1931 runs on the bank and what indication they gave that runs might happen in the future, should Howard, as an ordinary prudent person making deposits in that depository, have judged that the probability of the depository being closed if a future run occurred was so great, although the depository was perfectly solvent and sound, that the propriety of his continuing to make deposits or have deposits there was challenged. As thus stated, the question assumes the possibility of a run, disastrous or otherwise, occurring at the Phillip State and only inquires whether Howard, because of the 1931 runs should have judged that the chance of the depository being closed by a *ruinous* run was such that measures should have been taken with respect to the deposits, if measures were available, to avoid that chance.

Grave doubt must be expressed *in passim* on a matter implicit in this question. The evidence shows that the 1931 runs were all of fortuitous, external origin. Not only were they not caused by, nor for that matter the cause of, any insolvency or instability of the depository; they

resulted from no internal condition of the bank whatsoever. Each of the runs was directly attributable to the general banking situation and unhealthy state of panic in the public mind. The April run came with the closing of several banks, pp. 8-9, *supra*. The June run followed the announcement of the mergers of two of the large "loop" bankruptcy depositories, pp. 9-10, *supra*. The September run occurred when a bank located directly across the street from the Phillip State, failed in the aftermath of the "Bain chain" closing, p. 14, *supra*. It was a time when recurrent waves of runs were taking place, striking all banking institutions, large and small; when national aid in stemming the tide had not yet succeeded and state efforts were hopeless; when "numerous banks and financial institutions all over the country, which had theretofore been not only abundantly solvent but in a flourishing financial condition failed," *Brennan* v. *Eubank*, (Tex. Civ. App.) 56 S. W. (2d) 513, 515. It was a time when great public fear for all banking institutions existed, when hardly an individual then living in urban centers like Chicago and having funds on deposit did not experience very real anxiety concerning his money. It is apparent, therefore, that what caution the 1931 runs bore of the possibility of future runs taking place at the Phillip State, was merely that of the risk then confronted by all solvent and going banks, that is, that runs were striking indiscriminately everywhere without cause and founded on wholly psychological forces.

The question therefore, whether Howard in the performance of the supposed duty should have judged, because of the 1931 runs, that the chances of the depository being closed by a run were such as to warrant the taking of steps with respect to the deposits, assumed not only the possibility of runs occurring, ruinous or otherwise, but

that runs finding their origin in psychiological forces and utterly unpredictable as to direction or extent, could form a basis for a reasonable judgment on what the probabilities were of the bank in fact encountering and being closed by such a run. Whether such prediction could be made is exceedingly dubious. The probabilities of a solvent and going bank being met or closed by a run of psychological cause cannot fall within the scope of logical decision. And the significance is this: If such judgment cannot reasonably be made, no duty of care to make the judgment can arise, and a motion for a directed verdict would be warranted on the mere showing that the duty which is charged to have been violated involved the making of such judgment.

Nevertheless, a retrospective view will be taken and inquiry made as to whether in the light of the occurrence of the 1931 runs on the depository and what indication they gave that such runs might happen, Howard reasonably judged as an ordinary prudent person the probabilities of the depository being closed by a future run. Such a judgment would rest on three factors: *first*: the chance of any run occurring at all; *second*: the formidability of the run if it did occur; *third*: how well the bank could meet it.

If runs stimulated by panic can have some rationality attributed to them, what facts there were upon which to make prediction all pointed away from probability of any run occurring. The facts, all known to Howard, were as follows: The Phillip State was one of the old established institutions in its community. In late 1930, when the period under review commenced, prominent bankers spoke of it as one of the best, if not the best, of the banks on the north side (R. 256) and one year later in the fall of 1931 it was classified as an "A" institution by the

Chicago Clearing House Association in a general survey of the banking situation made at that time (R. 176). The financial statements of the depository published in newspapers according to state law showed at no time during 1931 or thereafter that the bank was insolvent or in an unsound condition (R. 84-101). People knew that the bank had met the three runs in 1931 when banks throughout the city had closed and "loop" banks merged, that in 1932 during the six months prior to the actual close of the bank when runs were being experienced elsewhere (R. 105-107) not a single run occurred at the Phillip State and its business was then in a flourishing condition. In middle 1931, the Phillip State took over the Illinois State Bank of Evanston (R. 129-131). It was also a well-known fact that the Central Trust Company, later the Central Republic Bank and Trust Company, had undertaken to advance and had in fact advanced what additional cash might be or was needed by the Phillip State to meet emergency withdrawals (R. 170-171, 260).

As to the facts upon which the formidability of a future run might have been judged, those just mentioned apply equally here. The reputation of the bank as shown by its history, what bankers thought of it and how it was rated, the solvency of the bank throughout the entire period and its ability to meet the 1931 runs, the relationship with the Central, all would tend to minimize the possibility of a run being large or extensive in the event one occurred, provided, of course, that there may be supposed the existence of any more real basis for reasonably predicting the size or extent of a run originating in psychological sources than for predicting the occurrence of the run itself.

As to judging how well the Phillip State could meet a future run if such occurred, the record shows and Howard knew that the bank was in an unusually strong position.

It had the assured and proved support of another bank, the Central Trust. While at the end of 1931 the deposits of the bank, like those of all banks, had diminished because of runs, the solvency or stability of the bank had in no wise been affected and during the first five months of 1932 deposits were rapidly returning, p. 15, *supra.* In March 1932 the bank reached its highest point of liquidity for the entire period under review, with cash, government bonds and amounts due from other banks constituting 37.54% of the total deposits. This exceptional liquidity was sustained during 1932 (R. 72). Bills payable were reduced during the same five months by about two-thirds (R. 139).

In *Re Stone's Assignment,* 220 Ia. 1341, 264 N. W. 604, the facts were in several respects similar to those present in this case except that no depository system was operative. An assignee for the benefit of creditors, administering the estate of an insolvent debtor, placed estate funds in the Winneshiek Bank which closed in January, 1932. The assignee resigned, and a successor assignee was appointed. The controversy arose on objections raised by the successor to approval of the assignee's report. The successor contended that the assignee, as well as the surety on the assignee's bond, was liable for the loss on the ground of negligence in the safekeeping of the funds. A state statute provided that assignees, common law trustees, executors, etc., could file a petition with any court having jurisdiction over them, asking it to designate some bank as a depository for the safekeeping of the funds entrusted to them, and upon notice and hearing a bank could be designated as a depository for such funds. After designation, no deposits in the bank could be withdrawn without the consent of the court. The evidence showed that before depositing the funds, the assignee had applied for an order

to designate the bank a depository, but failed to give notice. Two issues were presented for decision: *first,* was the assignee absolved from any liability for negligence by virtue of the fact that the bank had been designated a depository *ex parte; second,* assuming the assignee was not relieved, was he liable for allowing the estate moneys originally deposited with the bank to remain there, and depositing additional estate funds, under the facts of the case. On the first issue the Supreme Court of Iowa held that the designation could afford no protection, although it also pointed out that, p. 606:

> "If such order had been procured pursuant to such statutory provision, there would be no further liability upon the part of the appellee as to funds deposited pursuant to such order."

With respect to the second issue, the court held that no negligence had been shown, saying, p. 607:

> "Appellant contends that the appellee was negligent in leaving the deposit in the Decorah Bank, because there were rumors that said bank was not good; because the deposits in said bank were shrinking rapidly; because the banking conditions during the period involved were critical; because many banks were closing; because it was the practice and custom in the northeastern portion of the state, where the assignment was made and where the Winneshiek County State Bank was located, to protect such deposits with collateral security; because there was a vault containing a screw door safe in the Bank of Waucoma where such funds could safely be kept; and because the appellee placed no personal reliance in the Winneshiek County State Bank.
>
> Appellee, on the other hand, presented evidence that the assignee had no personal knowledge of the in-

solvency of the Winneshiek County State Bank; that after his appointment he made inquiry of the cashier of the Bank of Waucoma, of which he was the assignee, in regard to the solvency of the Winneshiek County State Bank and of the advisability of depositing funds therein, and was advised that it was considered a reliable depositary; that he had known of the Winneshiek County State Bank for several years prior to his appointment as assignee, and that it had always borne the reputation of being a strong and reliable bank; that he had for several years and during his incumbency as assignee examined the semiannual published reports of said bank, and that from such reports he had reached and had ground for reaching the conclusion that it was a safe and reliable depositary; that the Bank of Waucoma, of which he was assignee, had used said depositary for years prior to his appointment as assignee; that, in leaving the deposit in the Winneshiek County State Bank, in procuring the order of court naming it as depositary, and in adding to the deposits therein at the time of his appointment, he was acting honestly and according to his best judgment; and that, in so doing, he did not fail to exercise the reasonable care that a person of ordinary prudence would exercise under the circumstances.

We think the evidence in the case is sufficient to show that the Winneshiek County State Bank was regarded as one of the strong banking institutions of the northeastern portion of the State of Iowa; and that, although, during the period of appellee's incumbency as assignee, other banks had been failing throughout the northeastern and other parts of the state, the conditions then existing were not such that the appellee, as an ordinarily prudent person, was

bound to withdraw the funds in his hands from this bank. We cannot agree with the appellant's argument that the safe in the vault in the Bank of Waŭcoma would have been a safer place to keep the deposit than the bank in which he placed it. If these funds had been placed in that safe and had been lost by reason of burglary or robbery, it might, we think, be claimed with better reason than is here presented, that the appellee was negligent in exposing them to this danger. While many banks were failing during the time in question, it cannot be said that people generally realized, or should have realized, that many of the banks which were still operating were insolvent or would be compelled to close their doors. If each person who left a deposit in a bank that later failed can be said to have been negligent in so doing, then it would seem that there were more negligent depositors in many of these banks than there were people who exercised ordinary prudence. A consideration of all of the evidence leads us to the conclusion that the appellee was not guilty of any such negligence as would make him personally liable for the total amount of the funds on deposit by him in the Winneshiek County State Bank."

State v. *Copeland,* 96 Tenn. 296, 34 S. W. 427, 433-434, arose from the 1893 panic. Copeland, a town trustee, and the sureties on his official bond were sued for the loss of town moneys deposited in the Nashville Savings Bank, commonly referred to as Marr's Bank. No depository system was provided by statute and no officer designated Marr's Bank a depository, although the court in its opinion noted that Copeland, prior to making the initial deposit, had conferred with the local judge and secured his oral statement of approval for the deposit. Copeland

also discussed the bank with various bankers and learned it was in good repute in financial circles, that it had withstood previous banking crises and was commonly regarded as solvent. The time, however, was a period of financial panic and various statements that the bank was unsound or would break reached Copeland. The trial court had found as a fact that Copeland was negligent and imposed liability for the loss. The reviewing court, however, took a less stringent view of the duties of care toward trust funds in days of panic and reversed the judgment, ordering the bill dismissed. That court's attitude towards the facts and the extent of care the law imposes under such circumstances appear from the following language:

> "Mr. Estes, the cashier of the Livingston Bank, states, that a short time before the failure of Marr's Bank, he met with Copeland in Nashville. At that time there was a financial panic all over the country, which had affected the country banks as well as the city banks of Nashville. The Capitol City Bank of Nashville closed, and on the next morning witness had a conversation with Copeland, in which the distressed condition of all the banks was commented upon, and in that conversation Copeland stated that he had his money in Nashville, and was a little uneasy about it. * * * Witness intimated to Copeland that Marr's Bank was unsound. * * * A few days thereafter Copeland was in Livingston and * * * on this occasion witness states that he again referred to the unsoundness of Marr's Bank. * * *
>
> The learned chancellor was of opinion that due caution and diligence was not used by defendant. He says: 'In this case the defendant made no personal examination, nor did he have any examination made, as to the solvency of Marr's Bank, nor had the bank

officials made any publication for a long while of its condition, as required by its Charter. He took the opinion of his friends, whom he confided in, but the opinions given were not based upon any examination or actual knowledge as to the solvency of the bank.' Nothing can be predicated to the prejudice of the defendant, that he did not make or cause to be made a personal examination of the bank. * * * The standing of a bank can alone be determined, by outsiders, by its mode of doing business and its reputation in business circles. * * *

The conclusions to which we come * * * are:

1. That the defendant was * * * responsible only for the exercise of good faith, diligence, prudence, and caution, * * *.

2. That it was neither negligence nor want of proper business prudence and caution to deposit the funds in a bank of undoubted standing and reputation. * * *

6. The defendant Copeland was justified in not returning the funds to the Livingston Bank, when the president and cashier of that bank suggested that it be done."

In an astonishingly large number of cases arising from bank failures during periods of financial crisis, some from failures during the 1893 panic, others during succeeding panics including the present depression, common law fiduciaries and other persons under similar obligations of due care towards funds of others, have been absolved from liability for loss of trust or public funds through bank failures, with practically no discussion. The decisions in these cases almost summarily dismiss any question of liability. As illustrative, *Barney* v. *Saunders*, 57 U. S. (16 How.) 535; *Harper* v. *Betts*, 177 Ark. 977, 8 S. W. (2d)

464; *Wilson* v. *People,* 19 Colo. 199, 34 Pac. 944; *Hart* v. *Savary,* 114 Fla. 41, 152 So. 705; *Gross* v. *Butler,* 48 Ga. App. 750, 173 S. E. 866; *Town of Danbury* v. *Riedmiller,* 208 Ia. 879, 226 N. W. 159; *In re Olson's Estate,* 206 Ia. 706, 219 N. W. 401; *Prudential Ins. Co.* v. *Hart,* 205 Ia. 801, 218 N. W. 529; *In re Workman's Estate,* 196 Ia. 1108, 196 N. W. 35; *Carey* v. *Safe Deposit & Trust Co. of Baltimore,* 168 Md. 501, 178 Atl. 242, 248, 250; *In re Mullen's Estate,* 97 Mont. 144, 33 Pac. (2d) 270; *In re Welch's Estate,* 100 Mont. 47, 45 Pac. (2d) 681; *In re Kruger's Estate,* 141 Misc. 475, 252 N. Y. S. 688; *Neff* v. *Harmon,* 145 Okla. 114, 291 Pac. 518; *Clemons* v. *Dennis,* (Va.) 181 S. E. 387; *In re Kohler's Estate,* 15 Wash. 613, 47 Pac. 30.

The existence of the depository system, as well as the part played in it by the designating authority and the designated depository, though it be held not legally conclusive on the matter of Howard's liability under the rule of non-responsibility, certainly must be considered as a fact circumstance in determining whether Howard discharged the supposed duty.

Howard knew that under the statute the bankruptcy court acting in its administrative capacity had exclusive supervision over deposits of bankruptcy funds in the Phillip State, that the court was vested under the law with the sole and absolute power to determine what disposition should or could be made with respect to the funds there on deposit—whether the times required that a restriction of some character should be placed on the making of deposits there, or that the depository bonds be increased, or that the designation itself be revoked and all deposits directed by summary turnover order to be returned to the custody of the bankruptcy court. Knowing this Howard had a right to presume that the designating

authority was familiar with the general condition then prevailing and affecting the safety of deposits in designated depositories of the bankruptcy court, and was performing its administrative functions of supervision and control.

In *County of Marshall* v. *Bakke,* 182 Minn. 10, 234 N. W. 1, 4, in absolving a county treasurer and the surety on his official bond for a failure to withdraw county funds from a depository which had closed, the court said: "all of these officials [the designating authority and authority that approved the depository bond] resided or did their official work in the same place as Bakke [county treasurer] and presumably were as well informed of the financial condition of the banks as he."

In *Rosebud County* v. *Smith,* 92 Mont. 75, 9 Pac. (2d) 1071, 1073, in pointing out that the duty to file a claim against a closed bank for money lost in its closing under law lay with the designating authority and not with the depositing officer, it was said: "the presumption is that * * * the board of county commissioners [designating authority] knew at all times the conditions respecting the county deposits and debts due to and from the county."

In *Board of Education* v. *Nelson,* 33 N. Dak. 462, 157 N. W. 664, 667, where the designating authority did not require, as it had power to do, additional bonds from the depository and the depository failed, the court said of the depositing officer's knowledge of the security, that he "had a right to presume that the school board [designating authority] had performed its duties."

In *Board of Commissioners* v. *Elmund,* 94 Minn. 196, 102 N. W. 719, 720, it was said with respect to depositing officers in depository systems and what they may presume of other officials in the systems: "some benefit must be

given to the presumption that public officials [designating authorities] will and have done their duty."

Also: *State* v. *Krause*, 186 Wis. 59, 202 N. W. 319, 322-323.

Howard could guide himself by much more than a mere presumption in law that the designating authority knew all the circumstances surrounding the deposits at the Phillip State and was exercising what supervisory powers were necessary with respect thereto. The record shows, and Howard knew, that after the first run and apparently at the very time of the second, the authority empowered under law to deal with the question, if any, of safety, with full knowledge of the bankruptcy deposits at the Phillip State, made an investigation of the depository; that that authority thereafter at no time issued any administrative order limiting or restricting deposits, or increasing the bond or directing a withdrawal or any other act or thing to be done; that that authority had issued an order requiring reports giving it special information concerning depositories and deposits there made; and that such reports concerning the Phillip State had been filed with it by Howard himself, pp. 10-13, *supra*. With this knowledge Howard had every right to judge (if he was under duty to judge) that the continued deposit of bankrupt estate funds at Phillip State was perfectly proper.

Nothing has thus far been said concerning the question what Howard should or could have done, if it be assumed that an ordinary prudent person in his position would not have continued making or retaining the deposits at the Phillip State. A word, however, may be said of the point because it serves to emphasize the conclusion that the assumed duty was not violated.

The record does not indicate at what *point of time* during the period under review Howard should have done

something about the deposits at the Phillip State. The dates of the opening of the accounts of the various estates represented in these suits were distributed quite uniformly over the twenty-two months involved (R. 12-29) and this fact suggests in the present inquiry serious questions of proximate cause as to the liability for loss in each of the separate estates. The trial court in its charge to the jury instructed it to find for petitioners if "*throughout* the period that is here under review [the depository] had become a hazardous place to have trust funds [because of the run]" etc., (R. 299). However, there is great difficulty in concluding under any theory that "throughout" the period from August, 1930 to June, 1932 the depository was hazardous. The most than can be said is that at the time of the runs or thereafter the duty to do something on Howard's part arose. What does this duty to do something amount to?

As to funds already on deposit there was only one thing that Howard could do, namely, inform the designating authority that he had deposits in that depository, that the bond of the depository was in the amount that it was, that the times were times of panic and although the Phillip State was perfectly solvent and had met three runs still the times were times of panic, and that the designating authority might do something about the matter. In addition, Howard may have suggested that the designating authority consult with the designated depository about increasing the bond or confer with persons having knowledge. Howard was not an ordinary fiduciary making deposits at a bank, and when he placed the funds in the depository he was prohibited from withdrawing them except by check countersigned by the designating authority or its agent.

It must be clear that as to funds already on deposit when the supposed duty to do something arose, all that could

have been done was in fact done and no liability for not doing it could accrue.

As to deposits of funds yet to be made, when the duty to do something arose, Howard had the privilege under the Bankruptcy Act of depositing them in "one of the designated depositories", 11 U. S C. A. 75 (a) (3). Were there any depositories other than the Phillip State where a deposit would have satisfied the duty? The evidence adduced as to these depositories has already been discussed, pp. 16-17, 63-67, *supra*. From what was there said, it appears that nothing had been shown which would indicate that the other depositories were any safer than the Phillip State, and on the record it must be presumed that they were not.

The trial court in charging the jury instructed that it might consider as a circumstance showing want of due care, the fact that the deposits in the depository exceeded in a substantial amount the penal sum of the depository bond (R. 297). From the standpoint of the amount on deposit in the respective account of each of the estates at the time the bank closed, none exceeded the amount of the bond (R. 61-64, 67). Except for a few larger amounts, the respective deposits in the majority of estates was then around $1,000.

The most that excess might mean in any case is that the duty of care *could* arise. Mere deposits below the amount of the bond, in the absence of a showing that the bond was worthless, and that that fact was known or should have been known to the depositing officer, raises no issue at all.

Assuming, however, that the relative size of the bond was of consequence, what could Howard have done about it? As to deposits already in the depository, all that he might have done would have been to tell the designating

authority of the amount of deposits on hand as compared with the depository bond, and then to ask that the authority give the matter consideration. However, had not that in fact been done? And if so, can liability be imposed on the theory that such act had not been done? As to funds not yet deposited, all that he might have done would have been to make deposits in another depository where the amount of the depository bond did not exceed the sum of the aggregate bankruptcy funds then on deposit in such depository. This would have required an investigation of all the depositories in order to ascertain where such favorable condition existed, although the only person who would know such fact was the designating authority. Nor could he rest there. Upon discovering such depository he could not stop with his first examination but would have to investigate from time to time to make certain that the ratio between the amount of aggregate funds deposited by all receivers and trustees in addition to that which he deposited did not exceed or was not likely to exceed the amount of the depository bond. If such excess developed, he then would be in the same position as he originally was in; he would have to go to the designating authority, tell it about the matter and ask that something be done and, meanwhile, as to future deposits, open new accounts in other depositories until the same situation again presented itself there. The absurdity of these conclusions which one must accept in assuming the existence of a duty to do something, shows that one cannot ignore the existence of the depository system and its method for handling the situation, particularly the equality of all depositories as places of deposit, without regard to size of bond.

Moreover, no showing was ever made by petitioners that the amount of aggregate bankruptcy funds in any other depository, assuming the existence of another depository

as safe as the Phillip State, did not exceed the amount of its depository bond, or the extent to which it did exceed. A witness for petitioners testified to the amounts of the respective bonds of the other depositories (R. 112-113), but nothing was ever introduced as to the relative amount of the aggregate deposits and the depository bonds. Proof offered by respondents, chiefly in other connections, and refused by the trial court showed that in that period at least four of these depositories had aggregate amounts greatly in excess of their depository bond. The First National Bank had about $1,000,000 in bankruptcy funds and a $250,000 bond; the Continental-Illinois Bank had close to $700,000 of deposits and a bond of $250,000; the National Bank of the Republic had over $1,100,000 on deposit and a $50,000 bond; the Foreman Bank had approximately $300,000 in funds and a $50,000 bond (R. 112-113, 157).

A chart setting forth statistical data was introduced below by petitioners showing the relationship, at the end of each month during the period under review, which the amount of aggregate bankruptcy funds deposited by Howard in the Phillip State bore to the total deposits of the bank, to its total individual demand deposits, and to the amount of cash, government bonds and amounts due from other banks (R. 72, 69, 81). Respondents raised several objections to the admission of this evidence, which were overruled (R. 68, 81). The apparent purpose of this showing was to establish that the depository bank was a comparatively small bank and the relative amount of the aggregate deposits in the estate accounts kept with it, was high. The record shows that the ratio of total estate deposits to the total deposits of the bank was in no way exceptional. It varied with each month, sometimes higher and other times lower, ranging from 7.33% to 15.30%.

In most of the months, the ratio was 11% or under. It is common knowledge that in those days, the proportionate amount of bank deposits representing funds belonging to failed businesses administered by trustees or receivers in court proceedings, was much higher than the above ratios.

The admissibility of the chart is exceedingly doubtful. In *State* v. *Copeland*, 96 Tenn. 296, 34 S. W. 427, 434, where the depositor was charged with negligence in not discovering the insolvency of a bank which later failed, the court said:

> "Nothing can be predicated to the prejudice of the • • • [depositor], that he did not make, or cause to be made, a personal examination of the bank. Such an examination, except perhaps by an expert, would have resulted in nothing reliable. Nor would any bank of standing submit to a personal examination by its customers. (Word in brackets added.)

There is no particular significance in the fact that the Phillip State was not a large bank, or that the aggregate amount of the deposits in the accounts kept with it by Howard were around 11%. It is common knowledge that no bank, large or small, then enjoyed special immunity against runs. The bankruptcy court did not consider large banks more proper places for bankruptcy funds than small banks (R. 112-113) and the evidence with respect to the Foreman Bank would not tend to establish such a proposition (R. 120-121). Certainly, whether the supposed duty was performed cannot depend upon the question, which banks were then safer, large or small.

Nor need particular attention be paid to the amount of aggregate bankruptcy deposits kept with the depository during the period. Unless the size of the aggregate amount in itself tended to weaken the depository, and there is

no reason for so concluding, it was without relevancy. Generally, size of deposits in a particular bank during a panic period is important only from the viewpoint of diversification, that is, whether safety might be secured by dividing the aggregate among many banks. But, diversification cannot apply to an aggregate which is the aggregate of the respective amounts of several estates, especially where the respective amounts, as here, were each around $1,000 (R. 61-64, 67). In only six of the entire one hundred and twenty-four accounts in controversy did deposits exceed $10,000, and only two of the six exceeded $20,000 (R. 61-64, 67). From a business and practical viewpoint the smallness of the amount of deposits in each of the separate accounts precluded any possibility of diversification of the funds in each separate account.

B.

Materiality of the proof of loans on whether the supposed duty of care arose and was discharged.

The theory of materiality upon which proof of the loans from the Phillip State to Howard, was admitted, may best be gathered from the charge to the jury (R. 298). The trial court stated: the loans made by the bank were personal obligations of Howard because he was individually responsible for their payment; for what purpose Howard borrowed the money is unimportant because the loans were personal obligations; inasmuch as the obligations were personal, Howard would be reluctant, should the occasion ever have required it, to withdraw the funds on deposit at the depository or to stop making deposits (apparently on the supposition that should Howard have done so the bank would not have granted extensions of existing loans or make new ones to him); this reluctance

to withdraw or cease making deposits was a continuing state of mind in Howard throughout the period reviewed which "fettered" him in that it affected his interpretation of things which then occurred or presented themselves and which bore upon the question whether as an ordinary prudent person in discharging the supposed duty he should continue to make deposits or withdraw them from the depository (R. 298-299).

Assuming that the loans "fettered" Howard and affected his ability to interpret events and facts, what materiality did they have, thus viewed, upon whether Howard performed the assumed duty of care?

In the discussion heretofore an examination was made of the facts and circumstances appearing in the record which Howard would have had to interpret and judge in discharging the supposed duty. Consideration was given to such matters as the 1931 runs, the amount of the depository bond, the size of the depository, etc. It is apparent, though, that whatever pertinency proof of loans may have, the loans themselves do not come within the class of objective circumstances which supposedly would have guided the ordinary prudent person in Howard's position in making or maintaining deposits at the Phillip State. The 1931 runs raised the question (assuming a duty to predict a panic run could arise) whether Howard's conduct was any different from that of an ordinary prudent person under duty to determine whether the probabilities of the depository's being closed were so great as to require something to be done. Similar questions were raised by other facts considered. The supposed "fettering" of Howard's ability to interpret pertinent events and facts as a reasonable person, falls, however, outside the objective data by which the ordinary prudent person would be guided in determining the question of continuing deposits. The

supposed "fettering" was a state of mind personal to Howard. It constituted what the late Justice Holmes termed "the personal equation of the man concerned," *The Germanic*, 196 U. S. 589, 596.

Under the assumed duty, all that could have been required of Howard was that he should have acted with the *same* degree of caution which an ordinary prudent person would have exercised who had not made loans and been "fettered," as Howard is here supposed to have been. This standard was met. What circumstances might have existed, apart from the objective data, which possibly may have motivated him in acting as he did are absolutely immaterial if in fact his actual conduct coincided with the conduct of an ordinary prudent person not affected by the "personal equation."

Was Howard in fact "fettered"? The loans were usual bank loans made by an institution in the business of making loans, without any favor whatsoever attached. They were time loans, generally for three months, bearing interest at rates from 4½% to 6% per annum (R. 77-78). All loans were submitted to the board of directors and loan committee of the bank for approval and were made upon the personal financial statement of Howard. Loans of the type made to Howard had the regular approval of the Chicago Clearing House Association (R. 174). In no wise were they anything but pure business loans.

The purpose for which the money was borrowed by Howard and used by him likewise indicates the absence, in fact, of any "fettering," pp. 3-7, 71-73, *supra*. There was no legal obligation upon Howard to make advances to the estates. The advances were made merely in the convenience of petitioners and as a favor to them to avoid the expense and delay of continuous petitioning of the

bankruptcy court for allowances. It is difficult to understand how money borrowed for this purpose constituted a "fettering" in fact. If at any time Howard, in the exercise of the supposed duty of care, found it necessary to do something, whatever that act might have been, about withdrawing or discontinuing deposits at the depository, or, more realistically, if as a trustee or receiver in bankruptcy together with all other receivers and trustees, he was directed by the bankruptcy court to limit deposits at the depository, or if the court directed the depository by summary turn-over order to return all deposits to the custody of the court, all that might happen in such event would be that Howard upon maturity of the loans would have to pay them unless the bank, as a business proposition, would further extend them, and there is no showing that it would not do so in such case, or if Howard did not want any extension or an extension would not be granted, for him to pay the loans with money from either of two sources, viz., his own funds, or if he had none from an allowance of the bankruptcy court which could be secured upon petition showing the advances already made.

The "fettering" which the trial court assumed, and the jury was instructed to regard, arose in this way: (a) by virtue of the exclusion of all evidence showing the purpose and character of the loans, the loans remained purely personal obligations of Howard incurred in acquiring money to be used, so far as appeared, for whatever frolic he wished, (b) the loans were presumed to have been not ordinary business loans resting upon Howard's financial standing and worth but given him without regard to such matter, (c) the character of the loans being such, that is loans for whatever purpose Howard wished and not based upon his financial worth and reputation, it was assumed that they could not be expected to continue

if Howard withdrew the bankruptcy deposits at the bank or discontinued making deposits there; and *therefore,* Howard was "fettered" if at any time due care would require him to made a withdrawal or discontinue deposits (R. 298). This picture, caused chiefly by the exclusion of the evidence of the purpose for which the loans were made, though immaterial on the issue of due care, cannot be accepted.

VI.

IF THE CASE ON THE RECORD WAS ONE FOR A JURY TO DECIDE, NEVERTHELESS, THE JUDGMENT IN THE DISTRICT COURT WAS PROPERLY REVERSED AND THE CAUSE REMANDED FOR A NEW TRIAL, FOR THE REASON THAT REVERSIBLE ERROR WAS COMMITTED IN THE DISTRICT COURT'S RULINGS UPON THE ADMISSION AND EXCLUSION OF EVIDENCE, IN REMARKS OF THE COURT DURING THE TRIAL, IN RESTRICTIONS PLACED UPON ARGUMENT OF COUNSEL FOR RESPONDENTS, IN INSTRUCTIONS GIVEN TO THE JURY, AND IN REFUSAL TO INSTRUCT AS REQUESTED BY RESPONDENTS.

It has been pointed out that the liability sought to be charged against the respondents did not come within the provisions of the bonds upon which the suits are based; that without regard to such provisions, the responsibility did not exist in law; and, lastly, there was nothing in the record which established a failure by Howard properly to discharge that responsibility, if it did exist, and no issue for a jury in connection therewith was presented by the facts. However, assuming that it be held that the responsibility sought to be imposed comes within the scope of the bonds, that it is of a character recognized by the law and that the facts with respect to the discharge by Howard of

that responsibility are of sufficient weight to warrant a jury's passing upon them, nevertheless, the decision of the Circuit Court of Appeals must be affirmed and the case remanded for new trial, for the reason that the case submitted to the jury was not a proper case for determining that responsibility.

Prejudicial and reversible error was committed with respect to the evidence, the argument of counsel, the remarks of the court and the instructions to the jury. Most of these errors are self-apparent and require little comment. They violated rules which are well known, and accordingly will be dealt with *seriatim* in brief fashion.

A.

The number of assignments of error in the case at bar was necessary in order to preserve the errors committed below.

Petitioners, pp. 44-45, make a point of the number of assignments of error filed by respondents. In each of the cases cited by petitioners, the criticism made was of numerous assignments many of which were not argued or discussed, as for instance in the case of *Local 167, I. B. T.* v. *United States*, 291 U. S. 293, 296, petitioner's brief, p. 46, where some hundred errors were assigned and only five argued. In the case at bar, all of the assignments of error were argued in the Circuit Court of Appeals. This is a case of first impression and the District Court below proceeded throughout on theories which were contrary to what seemed to respondents to be the evident intent of the Bankruptcy Act. It is submitted that an examination of the errors assigned, in view of the record in the case at bar, shows that every one was necessary in order to preserve substantial questions which were ruled upon by the trial court adversely to the respondents, and the decision of which has done respondents grave injustice.

B

Erroneous Admissions of Evidence.

1.

TESTIMONY OF PETITIONERS' WITNESSES WITH RESPECT TO SEEING RUNS, HEARING RUMORS OF INSOLVENCY AND OF MAKING PERSONAL WITHDRAWALS OF MONEY.

The petitioners called to the stand six witnesses in succession who gave eye-witness accounts of runs occurring on the Phillip State, and testified to rumors about insolvency of the bank and to the making of personal withdrawals of their money (R. 117-118, 123-128, 313-314). None of the occurrences testified to happened after June, 1931, which was more than a year before the bank actually closed. The reiteration of the occurrences of runs, none of the stories being very clear, made it appear cumulatively as though innumerable runs had occurred. The statement and restatement of rumors of insolvency had a similar prejudicial effect upon the jury, and particularly was this testimony unwarranted when it appeared that the rumors were neighborhood rumors which were not shown to have come to the attention of Howard. Perhaps most unjustified of all and thoroughly incompetent was the testimony of the making of personal withdrawals by the witnesses of all of their deposits in the bank. The psychological effect upon the jury was the impression that anyone would have withdrawn his or her money from the bank, as indeed the witnesses did. The six witnesses presented themselves as an array of persons of ordinary demeanor and status, all of whom had been successful in not having permitted their funds to remain in the bank. The test for determining whether or not Howard exercised due care does not concern itself with some selected set of individuals who in fact with-

drew their money, individuals not remotely occupying the position which Howard did with respect to the funds on deposit.

2.

LOANS MADE BY PHILLIP STATE BANK TO HOWARD.

On several occasions during the course of the trial and in charging the jury, the making of the loans by the Phillip State to Howard was the subject of severe criticism by the trial court (R. 167, 215, 325, 298, 338). Thus, in commenting during the trial upon the making of loans to a receiver by a bank, for the purpose of administering a receivership estate, the loans being based on receiver's fees which have accrued in the estate, the court said:

> "Well, it is just an intolerable sort of thing. Nobody could give any sanction to that sort of thing • • • The idea of a bank—" (R. 167, 324-325).

In charging the jury, the court spent almost one-half of its time in again commenting severely upon the loans, saying among other things, that they were:

> "• • • utterly repugnant to what the situation permitted; not only under the law but upon any sort of a test of propriety permitted either to the bank or to the trustee" (R. 298, 338).

To a jury not thoroughly versed in the external standard of the ordinary prudent man, the mere introduction of the evidence which indicated only the personal equation and had no bearing on whether in fact the conduct of Howard conformed to the required standard, was obviously prejudicial, especially so when this evidence was repeatedly brought to the attention of the jury in a man-

ner most unfair to Howard. A restriction of the proof to the bare fact of the loans, a refusal to show the purpose for which the loans were made, a failure to distinguish between a personal loan amounting to a personal gain for the trustee or receiver and a loan for which he is personally liable but assumed for the benefit of his estate, all have been amply covered, pp. 3-7, 71-73, 96-100, *supra.*

3.

STATISTICAL DATA SHOWING COMPARISON PER MONTH BETWEEN ESTATE DEPOSITS AT THE PHILLIPS STATE AND VARIOUS ASSETS AND LIABILITIES OF BANK.

Petitioners introduced in evidence a chart setting forth statistical data showing the relationship, at the end of each month during the period reviewed, which the amount of aggregate bankrupt estate funds deposited by Howard in the Phillip Bank bore to the total deposits of the bank, the total individual demand deposits, and to the amount of cash, government bonds and amounts due from other banks (R. 72, 69, 81, 316-318). No showing was made that Howard knew of this month by month data. At pages 94-95, *supra,* the incompetency of this proof on the question of Howard's having exercised the supposed duty of care, was discussed. Moreover, the data itself merely singled out certain assets and liabilities of the bank as a basis for comparing the amount of estate deposits kept there by Howard and ignored other assets and liabilities. When this objection was raised by respondents, petitioners introduced a complete monthly statistical chart showing all assets and liabilities throughout the twenty-two months reviewed (R. 139). It too, was incompetent, as not being proper source material by which to judge the conduct of a person in Howard's position.

4.

EXISTENCE OF OTHER BANKRUPTCY DEPOSITORIES DURING THE PERIOD REVIEWED.

A witness for the petitioners testified to the twenty-one banks which had on file depository bonds at some time during the period (R. 112, 318). The impression given to the jury was that there were other places where Howard could have deposited the estate funds which were safer than the Phillip State. However, on the particular question as to the financial condition of these other depositories and such matters as the relationship between the amount of the bankruptcy funds deposited with them and the size of their respective depository bonds, nothing was shown. The objection of respondents to the admission of this line of proof has already been pointed out, pp. 16-18, 65-67, 93-94, *supra*. Upon the failure of the petitioners to establish the condition of the other depositories and the relationship between the bankrupt estate funds deposited with them and their respective bonds, the court should have excluded this evidence as prejudicial.

C.

Erroneous Exclusions of Evidence.

1.

PURPOSE FOR WHICH HOWARD BORROWED MONEY FROM PHILLIP STATE BANK AND PRACTICE OF TRUSTEES AND RECEIVERS IN BANKRUPTCY WITH REGARD TO MAKING ADVANCES TO ESTATES OUT OF THEIR PERSONAL FUNDS.

After the trial court overruled the objections of respondents to the admission of proof of the loans made

by the Phillip State to Howard, respondents offered to show that part of the money borrowed, had been used in paying debts which had been incurred by Howard in securing cash which he needed to pay out to different individuals for services rendered to the various bankrupt estates administered by him, as receiver or trustee in bankruptcy (R. 230, 229, 258-259, 326); and that the remaining money borrowed by Howard from the Phillip State had been secured for the sole purpose of, and was in fact used in, making personal cash advances to the various bankruptcy estates administered by him as receiver or trustee in bankruptcy in order to pay estate administration expenses such as custodian service fees, mimeographing and stenographic fees, insurance, bookkeeping and inventory service fees and so forth; that in the years 1930, 1931 and 1932 Howard made cash advances of this character to all of the estates in bankruptcy administered by him as receiver or trustee and that the amount thereof was very substantial; that at the time of the close of the bank the amount advanced to the estates involved in these suits alone was over $12,000; that the advances thus made to the particular estates with the money thus borrowed had been uniformly repaid to Howard at the time his report as receiver or trustee of any given estate was approved by the referee in bankruptcy and the bankruptcy court, and that while such advances were always so approved, some eight to ten months would elapse between the making of the advances and repayment (R. 206-207, 208-215, 251-252, 254, 324, 325-326). The respondents also offered to show, that for a period of at least ten years there existed among receivers and trustees in bankruptcy appointed by the District Court for the Northern District of Illinois, a general, well known and uniform practice to advance moneys

out of their individual funds on deposit in the bank to estates being administered by them in order to defray estate expenses, that such advances were regularly repaid upon approval by the court of the receiver's or trustee's report and that this practice was known to and approved by the referees and judges of the District Court (R. 254, 207-208, 326).

The foregoing evidence showing the purpose for which the money was borrowed from the Phillip State and establishing that the money was not used for Howard's gain, became vitally important when the trial court permitted the petitioners to show the fact of the loans. Without the above proof, the loans appeared as having been made wholly for the personal advantage of Howard and dependent for their continuance upon Howard's making deposits of bankruptcy funds in the depository. For all that the jury might know, the offered proof having been excluded, Howard had been risking bankruptcy funds in order to secure substantial amounts of money to be used as his personal pleasure directed. If proof of the loans was at all material, by that very reason the explanation of them became material. Otherwise, the jury was left in the position of being able to believe that Howard had been disloyal as a trustee or receiver in bankruptcy, or even guilty of unlawful conduct, and such belief would be bound to color its decision on the issue here assumed as properly presented to it, viz.: whether due care had been exercised by Howard.

Indeed, to say that the jury might so have concluded is putting it too mildly. As has already been pointed out, the trial court in its charge, with the offered evidence of defendants refused, proceeded to tell the jury that such loans were improper, not only in law but "upon any sort of a test of propriety" (R. 298). And, in another part of the

charge the trial court submitted for its consideration the question: "How should these proofs (referring to the evidence in the case such as the 1931 runs) have impressed a reasonably prudent man having no desire other than to safeguard and to conserve, with a singleness of devotion to the trust obligation, how should they have impressed Mr. Howard during this period of time, with respect to the course that he should pursue?" (R. 299). Aside from the incompetency of the question, because of its erroneous assumption that matters of personal equation are material in a negligence case (see pages 97-98, *supra*), the question, following as it did after the court's denunciation of the loans as occasioning a "fettering" of Howard, permitted the jury to give but one answer—that Howard had been lacking in "singleness of devotion." However, had the jury been given the opportunity to know that the money had been borrowed for estate purposes, had it been told that Howard, without any real necessity, had pledged his personal credit for both the convenience of creditors of the estates and in order to save the bankruptcy court the necessity for passing upon the propriety of numerous minute disbursements none of which could be questioned, the jury might very well have answered the question of "singleness of devotion" in another way.

2.

AMOUNT OF BANKRUPTCY FUNDS DEPOSITED BY RECEIVERS AND TRUSTEES IN DEPOSITORIES OTHER THAN THE PHILLIP STATE DURING THE PERIOD UNDER REVIEW.

When petitioners were permitted to show, over the objection of respondents, the existence within the district of bankruptcy depositories other than the Phillip State (R. 112-113), respondents offered to show that with re-

spect to two of these other depositories, namely, the Continental-Illinois Bank & Trust Company and the First National Bank of Chicago, the amount of bankruptcy funds on deposit with them in fall of 1931 was greatly in excess of their respective bonds (R. 283, 319). The respondents also offered to show, in another connection but here likewise pertinent, that the amount of bankruptcy funds in two of the other depositories, namely, the Foreman Bank and the National Bank of the Republic was also greatly in excess of their depository bonds (R. 157, 322). The offered proof tended to establish that so far as Howard was charged with negligence in making deposits in excess of the depository bond, such practice was true generally in the other depositories and the designating authority did not view mere deposits in excess as of any importance. This evidence was also relevant in several other situations heretofore discussed. See pp. 60, 89-90, *supra*. Upon admitting proof of the existence of other depositories and the amounts of their respective bonds, the trial court should have permitted the respondents to show the facts as to these other depositories and that there was nothing unusual in the amount of bankruptcy funds on deposit greatly exceeding the amount of a depository bond. Failure to permit such showing was prejudicial in that the jury might have believed that there was something unusual.

3.

THE REASON FOR THE CLOSING OF THE PHILLIP STATE.

The trial court refused to permit the respondents to show that on June 20th, the day preceding the closing of the Phillip State Bank, Beutel, its president, had a conversation with Philip R. Clark, president of the Central Republic Bank at which time Clark told Beutel that the

Central Republic would advance to the Phillip State all funds needed to meet the June run on the Phillip (R. 178, 315). The court further refused proof showing that the cause of the closing of the Phillip State was the repudiation by the Central Republic of its promise to advance funds to the Phillip State; the court also would not permit a showing of the circumstances under which the Central Republic made its refusal (R. 178, 315).

Heretofore, in discussing whether Howard, in view of the 1931 runs, acted reasonably in judging the probabilities of the bank's being closed by a panic run (assuming any person, even if under a duty of care, could make such a judgment, see pp. 78-81, *supra*) the relationship between the Phillip State and the Central Republic was pointed to as a circumstance tending to minimize the risk of closing. The promise of the Central to assist the Phillip State with what ready cash was needed to meet an emergency run and the actual giving of this assistance during the 1931 runs, had an important bearing upon whether an ordinary prudent person in Howard's position would have judged as Howard did. Upon proof that the Phillip State was closed in June, 1932, by a run, the question which would arise in the mind of the jury was whether the assistance of the Central had been given at that time as it had on prior occasions. If the assistance had been given and the Phillip State nevertheless closed, the jury very likely would presume that the Phillip State had closed from some cause other than the panic. If such an inference could be drawn, then the cause of the closing which Howard, in the exercise of the assumed duty of care would have had to judge on the facts as he knew them and predict, would change from cause to cause as the jurors conjectured on what the cause of the closing really was. No longer would the question

for them to decide be whether Howard reasonably judged these facts and predicted the probabilities of the bank's being closed by a panic run, but whether he reasonably judged and predicted whatever the jury, in the absence of the offered evidence, concluded *might* have been the cause of the closing. The jury was entitled to know that on the occasion of the June run, the assistance had been withheld from the Phillip State, and the closing was nothing more than the inability with which any bank during that period, would have been faced, when met by a panic run, namely, to convert its assets into funds necessary to meet the withdrawals of depositors.

4.

INQUIRY MADE IN EARLY JUNE, 1931, BY THE DESIGNATING AUTHORITY INTO THE GENERAL BANKING SITUATION THEN PREVAILING AND THE AMOUNTS OF THE BONDS OF THE DEPOSITORIES IN BANKRUPTCY; THE TELEPHONE REQUEST MADE OF ALL TRUSTEES AND RECEIVERS TO FILE WITH THE AUTHORITY A REPORT OF BANKRUPTCY FUNDS IN THE DEPOSITORIES AND HOWARD'S REPORT OF JUNE 9, 1931, WITH REPECT THERETO; THE EXERCISE OF ADMINISTRATIVE FUNCTIONS BY THE COURT THEREAFTER.

The trial court refused to admit evidence offered by the respondents of the following occurrences: On or about June 8, 1931, Judge Carpenter, then senior judge of the district court, held a conference with the clerk of the court for the purpose of discussing the banking situation, particularly the deposits of bankruptcy funds in the depositories (R. 144, 145, 319). The whole subject was reviewed with the judge, the amounts of bankruptcy funds in the depository were gone over, the size of the depository bonds examined (R. 145, 319). Judge Car-

penter directed Muir to telephone the various receivers and trustees in bankruptcy of the district court and request them to file statements showing in what depositories they kept their bankruptcy estate funds and the respective amounts thereof (R. 148, 320, 321). Following this conference, Muir promptly telephoned the receivers and trustees, including Howard, and told them of the court's request for a statement (R. 148, 263, 320, 321). On June 9, 1931, in compliance with Muir's request, Howard filed a report showing the amount of bankruptcy funds belonging to estates administered by him, on deposit in the Phillip State Bank and the Foreman Bank (R. 148, 263, 154-155, 320, 321).

The above evidence was highly important as part of the case and no plausible reason for the refusal to admit it is evident. Even if the existence of the depository system did not remove from Howard all responsibility to determine, with care, the condition and stability of the bank in making and maintaining deposits, nevertheless, the depository system, his part in it, and the authority exercised by the designating authority, constituted circumstances which entered into the judgments which he would have to make, and which must be considered in determining whether in making such judgments he acted as a reasonable prudent person. This has already been observed, pp. 88-90, 92-93, *supra*. The foregoing occurrences show that in the midst of the June, 1931, run period, following the mergers of the "loop" banks, the designating authority was acting to determine what could be done, if anything, about bankruptcy depositories and the security of bankruptcy funds. The telephone request made of Howard for a report not only shows the informal way in which the court as an administrative officer acted but that there was called to Howard's attention at the very

time of the second 1931 run, the fact that the designating authority was exercising its supervisory powers and investigating the situation. Howard would have the right, thereafter, to guide himself by that knowledge and to assume that if the Phillip State was not a safe depository, the designating authority, with exclusive power to decide the question, would so indicate by some order. The bankruptcy court issued no such order and Howard, knowing that fact, could control his conduct by it. The evidence was also important as showing that in the midst of that high panic period, the court requested and had given to it a report showing the amount of estate funds in the Phillip State, pp. 10-13, *supra.*

The trial court also refused to permit respondents to show further facts surrounding the functioning of the bankruptcy court later in summer after the receivers and trustees had filed their July, 1931, reports under the June 11th order. The evidence refused showed that Judge Carpenter instructed the clerk to bring him all periodic reports filed under the June 11th order (R. 162, 323), and that the judge, upon receiving the June reports, had his secretary prepare for his use a typewritten compilation based thereon, giving, in the instance of each bank depository, the names of all receivers or trustees who kept deposits there and the amounts, both separately and in the aggregate, of their deposits (R. 156-158, 322). The compilation stated the amount of Howard's deposits in the Phillip State and Foreman Bank and disclosed, among other things, in the National Bank of the Republic, the bank which had been merged in early June with the Central Trust and whose depository bond had been fixed at $50,000, an aggregate of $1,103,783.32 of bankruptcy deposits; in the Foreman Bank, the other "loop" bank which had then merged

and whose depository bond was also $50,000, an aggregate of $331,333.76 of deposits (R. 157, 113). While the foregoing evidence was not known to Howard, it nevertheless was important as part of the case necessary to show the jury precisely how the depository system functioned in those days in order that it might judge, in the light thereof, Howard's performance of the supposed duty of care.

Howard was not a common law fiduciary but an officer in bankruptcy with certain powers and certain relationships, and if the jury was entitled at all to determine his performance of the supposed duty of care, Howard in turn was entitled to have the jury consider all the circumstances of his office and position. For the trial court to have had the jury judge Howard's conduct by separating him from his office, and relationships with others in the depository system, meant simply to try him not under the circumstances as they existed but apart from them. His office and these relationships were circumstances of the case which the jury should have had explained to it and shown by the evidence.

Petitioners' brief, p. 46, contends that the only "proof of judicial action is the record of the court," and "what a particular judge" may have done is not competent. This contention indicates a want of understanding of how administrative functions are performed by judicial bodies. The bankruptcy court, in appointing a depository and continuing its designation, is no more expected to conduct hearings in open court as to the condition of a bank than it is expected to hear witnesses and conduct a judicial hearing to determine the fitness of a person to be appointed a referee, or his lack of fitness for removal purposes. See *Board of Finance* v. *First National Bank,* 71 Ind. App. 290, 124 N. E. 768, 770, discussed pp. 46, 58, *supra.*

D.

Improper Remarks of the Court During Trial.

Reference has already been made to certain remarks of the trial court with respect to the loans made by the Phillip State to Howard, viz.: "Well, it is just an intolerable sort of thing * * * the idea of a bank—" (R. 167). These remarks were highly prejudicial and related to a subject wholly immaterial, see pp. 96-100, *supra*. Error was assigned on these (R. 324-325).

E.

Improper Restrictions Placed by the Trial Court upon the Argument of Counsel for Respondents to the Jury.

Counsel for the respondents, in arguing to the jury at the close of all proof, referred to the general banking situation prevailing in the City of Chicago, in the district and in the country prior to and at the time of the closing of the Phillip State Bank (R. 288-291). The district court stopped counsel and refused to allow such argument to be made to the jury. Error was assigned (R. 327-329). The purpose of this argument was to place the occurrence of the 1931 runs in its historic setting in order that the jury in viewing it might properly decide how such circumstance would have affected the judgment of Howard as an ordinary and reasonable person in performing the supposed duty of due care. The jury could not judge fairly Howard and his supposed responsibility towards the funds during the years 1931 and 1932 without being able to draw upon its common knowledge as to the general state of panic which then existed. That the jury was privileged to consider such matters as of common knowledge, *Great North-*

ern Ry. Co. v. *Weeks,* 297 U. S. 135, 149, quoted heretofore at p. 76, *supra; Brennan* v. *Eubank* (Tex. Civ. App.) 56 S. W. (2d) 513, 515; *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 422, 444; *Carey* v. *Safe Deposit & Trust Co. of Baltimore,* 168 Md. 501, 178 Atl. 242, 248, 250. While the foregoing cases dealt with what a court might judicially notice of economic conditions occurring in 1929 and thereafter, it is well established that the jury may consider as of common knowledge, matters of which the court may take judicial notice, Wigmore, *Evidence,* (2d Ed.) Vol. 3, Sec. 1801.

F.

Improper instructions to the jury.

1.

REVERSIBLE ERROR WAS COMMITTED BY THE DISTRICT COURT IN INSTRUCTING THE JURY THAT IT COULD NOT CONSIDER OCCURRENCES OUTSIDE THE PROOF IN THE CASE ALTHOUGH SUCH OCCURRENCES WERE MATTERS OF COMMON KNOWLEDGE.

The trial court instructed the jury:

> "There were references in the testimony to what were characterized as matters of common knowledge, asserted occurrences outside of any proof here, assumed at the time, or since then, to have come to your knowledge as men of affairs in this community; and it was suggested, necessarily by implication, that you take those matters into consideration in determining this case. That, you are not privileged to do gentlemen," (R. 296, 333).

This portion of the charge referred to the argument which counsel for respondents sought to make, based on occurrences of the depression and panic period during the

years 1930 to 1932 (R. 287-291, 327-328). The instruction barred the jury from all consideration of the character of the times in deciding whether Howard acted as a reasonably prudent man in continuing to make deposits of bankruptcy funds at the Phillip State. To the jury, runs were occurring at the Phillip State and whatever few other banks chanced to be touched upon in the evidence but nowhere else. Howard was made to appear as a person who continued making deposits of estate funds in a bank that had runs when elsewhere placid banking conditions prevailed. The state of the public mind in those days, the waves of runs sweeping over all banks, large and small, the psychological forces which drove people to the windows of paying tellers, all were kept from a jury charged with deciding whether an individual's judgment with respect to runs on a bank when those events were happening, was reasonable. What has been said above with regard to the unwarranted limitation placed by the court on the argument of counsel for the respondents is here applicable.

2.

REVERSIBLE ERROR WAS COMMITTED IN THE COMMENTS OF THE COURT ON THE MATTER OF THE LOANS MADE BY THE PHILLIP STATE TO HOWARD.

The nature of the comment indulged in by the trial court in dealing with the loans which were made to Howard by the Phillip State, the characterization of the loans as "repugnant not only under the law but upon every test of propriety", as "fettering" Howard in the discharge of his duties, and as interfering with the single devotion required of him in the care of trust funds, have been discussed heretofore and were tantamount to telling the jury to hold Howard and his surety liable on a basis of disloyalty, if nothing else (R. 298-299, 338-340). See pages 103-104, *supra*.

3.

REVERSIBLE ERROR WAS COMMITTED IN INSTRUCTING THE JURY TO DISREGARD THE RELATIONSHIP BETWEEN THE CENTRAL TRUST AND THE PHILLIP STATE IN DETERMINING WHETHER AN ORDINARY PRUDENT PERSON WOULD HAVE MADE DEPOSITS IN THE PHILLIP STATE DURING THE PERIOD UNDER REVIEW.

The trial court instructed the jury:

> "• • • and you have a right to go through the whole body of the evidence and determine what facts he [Howard] knew respecting the condition of that bank: • • • and in that connection I want to say to you that those facts must be the facts that deal with the condition of the bank; and if, as is true, it was stated by men connected with other banks that they might or would stand back of it, that those things were communicated to Howard with the idea of indicating a hopefulness on the part of those who communicated those facts to him; those facts, none the less, did not change the condition of the bank, nor alter the duty which the law imposed upon the defendant Howard in respect of these funds" (R. 299-300, 342).

The foregoing instruction was highly improper, both in prejudical effect and in stating the law. The jury were thereby told to ignore the relationship between the Phillip State and the Central Trust. This relationship constituted one of the pieces of evidence the jury had before it in deciding whether Howard had judged as a reasonable person would have; yet the court directed the jury to ignore it.

4.

REVERSIBLE ERROR WAS COMMITTED IN PRESENTING THE CASE TO THE JURY IN A ONE-SIDED WAY.

With the exception of one sentence, the entire charge presented only the side of petitioners, and then did that in a way not warranted in law or by the evidence. Error was assigned (R. 343-344).

5.

REVERSIBLE ERROR WAS COMMITTED IN DIRECTING THE JURY UPON WHAT CONDITIONS THEY WERE TO FIND FOR THE DEFENDANT.

The trial court instructed the jury:

> "Now, if, upon a careful survey of all of this evidence, you feel that this bank was in a safe condition, and that there was nothing there involving hazards, great hazards to the trust funds, and that the defendant Howard knew of nothing that would challenge his right to continue not only to deposit, but to increase the deposits in the light of all the evidence here, as developed, your verdict in this case should be for the defendants" (R. 299, 341).

The foregoing was the only instruction stating to the jury on what conditions they were to find for the respondents. That charge was patently in error, and would itself afford ground for a reversal. The jury should have been instructed that if it found that Howard acted as an ordinary prudent person under the circumstances of the case, etc., viz., the general standard of care required of all defendants in negligence cases, then it was to find for the respondents; not that the jury was to find

for the respondents only if the three stated facts co-existed. The instruction amounted to a directed verdict for petitioners, because it instructed that unless the jury found the three facts stated in the instruction, it was to find for petitioners, and inasmuch as the issue of due care was not included among the three facts stated, in effect the jury was directed to find for petitioners on the issue of due care, the issue of the case. If Howard is to be tried for failing to exercise due care under the circumstances of the case, he was entitled to have the jury instructed accordingly.

F.

Reversible error was committed in refusals of requests of respondents to instruct the jury.

From what has been said heretofore the error of the trial court in refusing to give the following instructions requested by respondents is evident. The court refused to read to the jury the provisions of the Bankruptcy Act pertaining to the duties of trustees and receivers and the designation and supervision of depositories (R. 330-332), to instruct that if the judge of the bankruptcy court knew the amount of bankruptcy funds on deposit in the Phillip State, the size of the bond and failed to increase the amount of the bond, Howard had the right to assume the court believed the bank a safe place to maintain such deposits (R. 332-333), and refused further to instruct that no duty was owed as a matter of law to limit the amount of deposits of bankruptcy funds in the Phillip State to the amount of the depository bond of said bank (R. 329).

CONCLUSION.

For all of the foregoing reasons, it is respectfully submitted that the judgment of the District Court below was erroneous, and that accordingly, the judgment of the Circuit Court of Appeals for the Seventh Circuit, in reversing said judgment of said District Court and remanding the cause for a new trial, should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937.

No. 30

UNITED STATES OF AMERICA, ON RELATION OF CHESTER A. WILLOUGHBY, AS TRUSTEE IN BANKRUPTCY OF NATIONAL MECHANICAL SERVICE COMPANY, A CORPORATION, ET AL.,

Petitioners,

vs.

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

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Table of Cases Cited.

PAGE

Bingaman v. Commonwealth Trust Co., 1 F. (2d) 505 (D. C. Pa.) 10

Board of County Comm'rs v. Mason, 38 Wyo. 1, 264 Pac. 93 4

Board of Education v. Nelson, 33 N. D. 462, 157 N. W. 664 ..... 13, 14

Board of Education v. Whisman, 56 S. D. 472, 229 N. W. 522 9

City of Billings v. Mass. Bonding & Insurance Co., 88 Mont. 91, 290 Pac. 246 13

City of Parsons v. Fid. & Dep. Co., 29 F. (2d) 417 (D. C. Kan.) rev'd 43 F. (2d) 315 14

Compton v. Marengo County Bank, 203 Ala. 129, 82 So. 159 4

County of Marshall v. Bakke, 182 Minn. 10, 234 N. W. 1 9

Cozad v. Thompson, 126 Neb. 79, 252 N. W. 606 ..... 8, 15

Hasty v. Marengo County Bank, 203 Ala. 280, 89 So. 433 4

Holt County v. Cronin, 79 Neb. 424, 112 N. W. 561 9

Hoyt & Mitchell, In re, 127 Fed. 968 (D. C. N. C.) 4

Hoyt, In re, 119 Fed. 987, 988 4

Huttig Mfg. Co. v. Edwards, 160 Fed. 619 (C. C. A. 8) 5

Imperial Assurance Co. v. Livingston, 49 F. (2d) 745 (C. C. A. 8) 9

Independent School District v. Flittie, 54 S. D. 326, 223 N. W. 728 7

Jordan v. Baker, 252 Ky. 40, 66 S. W. (2d) 84 8

Kyle, In re, 181 Fed. 617 (C. C. D. Mass.) 4

Lane Independent School District v. Endahl, 55 S. D. 73, 224 N. W. 950 8

Meehan v. King, 54 F. (2d) 761 (C. C. A. 1) 10

Miller v. Batson, 160 Mass. 642, 134 So. 567 ..... 4, 13

PAGE

CASES CITED (continued).

Missoula County v. Larson, 83 Mont. 308, 271 Pac. 710..13, 14
Murphy v. John Hofman Co., 211 U. S. 562, 568 10
Perkins v. State, 130 Miss. 512, 94 So. 460, 463..... 4
Potter v. Fid. & Dep. Co., 101 Miss. 823, 58 So. 713..... 14
R. J. Reynolds Tobacco Co. v. A. B. Jones Co., 54 F. (2d) 329 (C. C. A. 8) 5
Rosebud County v. Smith, 92 Mont. 75, 9 Pac. (2d) 1071 13
Seneca Independent School District v. Traner, 63 S. D. 68, 256 N. W. 365 9
Singer Furniture Corp., In re, 47 F. (2d) 780 (D. C. S. D. N. Y.) 4
State of Kansas v. U. S. Fid. & Guar. Co., 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865..... 4
State v. Madison State Bank, 77 Mont. 498, 251 Pac. 548 14
State Treasurer's Settlement, In re, 51 Neb. 116, 70 N. W. 532 13
State v. U. S. Fid. & Guar. Co., 210 Wis. 178, 246 N. W. 434 4
Town of Hamden v. Am. Surety Co. of N. Y., 9 Fed. Supp. 733 (D. C. Conn.)..... 8, 13
United States v. Union Surety & Guaranty Co., 118 Fed. 482 (D. C. N. Y.) 10
U. S. Fid. & Dep. Co. v. Village of Bassfield, 148 Miss. 109, 114 So. 26 14
Zimmerman v. Coblentz, 179 Md. 468, 185 Atl. 342..... 8

STATUTES CITED.

Ala. Code Ann. 1928, Supp. 1932, Sec. 315 13
Ala. Code Ann. 1928, Supp. 1932, Sec. 317 13
Ala. Code Ann. 1928, Supp. 1932, Sec. 2410 13
Bankruptcy Act, Section 47 (a), 11 U. S. C. A. 75 (a)....2, 12
Bankruptcy Act, Section 50, 11 U. S. C. A. 78 ..... 3, 5

PAGE

STATUTES CITED (continued).

Bankruptcy Act, Section 61, 11 U. S. C. A. 101 3
Fla. Comp. Gen. Laws, 1927 Ann., 1934 Supp., Secs. 2404-2405 13
Fla. Comp. Gen. Laws, 1927 Ann., 1934 Supp., Sec. 2409 13
Fla. Comp. Gen. Laws, 1927 Ann., 1934 Supp., Sec. 2410 13
General Order in Bankruptcy 29, 11 U. S. C. A. 53....4, 5, 11
General Order in Bankruptcy 40, 11 U. S. C. A. 53..... 10

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UNITED STATES OF AMERICA, ON RELATION OF CHESTER A. WILLOUGHBY, AS TRUSTEE IN BANKRUPTCY OF NATIONAL MECHANICAL SERVICE COMPANY, A CORPORATION, ET AL.,

Petitioners,

vs.

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

Sam Howard and Continental Casualty Company, a corporation, come now and petition this Court for a rehearing of this case, and respectfully show to the Court:

1. This Court by its opinion and decision holds that in spite of the nature of the duties imposed by Section

47(a) of the Bankruptcy Act* upon the trustee in bankruptcy in relation to the custody of bankruptcy estate monies awaiting disbursement or distribution, the duties of the trustee in bankruptcy throughout the period pending such disbursement or distribution are those of a common law fiduciary. Consequently this Court holds that the trustee in bankruptcy, when making or maintaining deposits of such monies in a bank designated under Section

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*Section 47(a) of the Bankruptcy Act, 11 U. S. C. A. 75(a), provides that the trustee in bankruptcy shall:

"(3) Deposit all money received * * * in one of the designated depositories.

"(4) Disburse money only by check or draft on the depositories in which it has been deposited.

"(5) Furnish such information concerning the estates * * * and their administration as may be requested by parties in interest.

"(6) Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts.

"(7) Lay before the final meeting of the creditors detailed statements of the administration of the estates.

"(8) Make final reports and file final accounts with the courts fifteen days before the day fixed for the final meetings of the creditors.

"(10) Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts within the first month after * * * appointment and every two months thereafter, unless otherwise ordered by the courts."

61 of the Act,* is required by virtue of his common law duties to investigate, ascertain, judge and determine, with ordinary care, the stability and solvency of the designated bank. Should there be more than one such designated depository in the district, then his common law duties required him reasonably to investigate, ascertain and judge the stability and solvency of the respective designated depositories; to select with care, the sound depository from the unsound; to determine, with care, whether policy requires a spreading of the funds among several or many of such depositories; and in making all such judgments to determine and take into account facts relating to the nature and amount of the depository bond** of each depository and the aggregate amount of bankruptcy monies currently there maintained on deposit by various or all of the trustees in the district. And, if there be only one designated depository in the district the trustee must continually investigate and judge of its condition, for the court's designation at most assures the deposi-

*Section 61 of the Bankruptcy Act, 11 U. S. C. A. 101 provides:

"Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

**Section 50 of the Bankruptcy Act, 11 U. S. C. A. 78 provides:

"(h) Bonds of * * * designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions."

tory's safety for a limited amount of deposits at the time of designation.

2. The opinion and decision fails to give consideration to the degree to which depository banks become part of the machinery of administration of bankruptcy funds. Just as in many states the office of state or county treasurer as an individual has been abolished and a depositary bank substituted because of its greater administrative efficiency, see for instance, *Miller* v. *Batson,* 160 Miss. 642, 134 So. 567, *Perkins* v. *State,* 130 Miss. 512, 94 So. 460, 463, *Compton* v. *Marengo County Bank,* 203 Ala. 129, 82 So. 159, and *Hasty* v. *Marengo County Bank,* 206 Ala. 280, 89 So. 433, and the depository bank itself regarded as an officer, *State of Kansas* v. *U. S. Fid. & Guar. Co.,* 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865; *State* v. *U. S. Fid. & Guar. Co.,* 210 Wis. 178, 246 N. W. 434; *Board of County Comm'rs.* v. *Mason,* 38 Wyo. 1, 264 Pac. 93, so in the bankruptcy system the depository bank is not used as an ordinary bank but as the machinery into which every cent received by a trustee or receiver must go as soon as it is collected and out of which all disbursements must be made.* For this reason banks cannot become depositories

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*General Order in Bankruptcy 29, 11 U. S. C. A. 53 provides that

> "no moneys deposited as required by the act shall be drawn from the depository unless by check or warrant signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn."

Any disbursal made from monies which have not first been placed in the depository is illegal, *In re Hoyt & Mitchell,* 127 Fed. 968 (D. C. N. C.); *In re Kyle,* 181 Fed. 617 (C. C. D. Mass). The depository is liable if it permits a trustee to withdraw funds unless all formalities have been complied with, *In re Hoyt,* 119 Fed. 987, 988; *In re Singer Furniture Corp.,* 47 F. (2d) 780 (D. C. S. D. N. Y.).

unless expressly appointed by court order.* The bankruptcy court prescribes the bond of the depository** and retains supervisory powers over the bank. The court from time to time furnishes the depository the names of the referees or clerks, authorized to countersign checks, General Order in Bankruptcy 29, 11 U. S. C. A. 53. The act does not specify that bankruptcy courts shall choose depositories and bond them with reference solely to their standing as banks; they are to be chosen for the convenience of the trustee in his bankruptcy administration; the bond may properly be fixed having regard to the care with which the depository will police the deposits and withdrawals rather than to insure the funds merely from a bank failure. All these and many other considerations to which a bankruptcy court may resort in designating, supervising or withdrawing designation of a depository must needs be none of the concern of a trustee or receiver. The imposition of a duty

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*Even the district court itself has no authority to order a trustee in bankruptcy to deposit elsewhere than in a designated depository, *Huttig Mfg. Co.* v. *Edwards,* 160 Fed. 619 (C. C. A. 8); *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.,* 54 F. (2d) 329 (C. C. A. 8).

**The bond given by the depository usually provides that the depository will "well and truly account for and pay over all monies" now on deposit or hereafter deposited with it and that it will pay only in accordance with the acts of Congress, rules and orders of court, see *In re Singer Furniture Corp.,* 47 F. (2d) 780 (D. C. S. D. N. Y.). The provision of the Bankruptcy Act, Section 50 (h), 11 U. S. C. A. 78 requiring "trustees, referees and designated depositories" to file bonds in the office of the clerk of the court, by referring to designated depositories in the same way as to trustees and referees is one indication of Congressional intent to treat depositories as in the category of trustees and referees and therefore in the nature of officers of the court.

on the trustee or receiver to investigate and judge of depositories will result in muddling up the clear divisions of duties and the checks and balances provided by Congress.

Further, to require a trustee in bankruptcy to judge a depository as a bank, while the bankruptcy court applies additional criteria in its evaluation, creates a hopeless conflict between the trustee and the court. To attempt to mold the duties and liabilities of the trustee or receiver on the assumption he should regard the designated depository in the same way a common law trustee judges the bank with which he deals, is to ignore the Bankruptcy Act and Orders.

3. The opinion and decision of this Court in the instant case is contrary to all existing authority. While many courts, both lower federal courts and the highest courts of more than a dozen states, have passed on the liability of various persons, fiduciaries, officers, quasi-public officers, for the loss of funds deposited in designated depositories, this Court is the first to hold any person depositing money in a depository designated by another pursuant to law to be under a duty to exercise due care in judging of the stability or safety of the depository. In every decided case discovered involving the duties of a person depositing pursuant to mandatory legal obligation in a depository, or in one of several depositories, designated by another acting under legal authority, it was held that the person so depositing would not be liable for mere failure to judge the bank's condition with due care, without regard to whether any statute made provision as to exoneration.

This Court in its opinion, footnote 6, states that some courts have held in the absence of a statutory exculpatory clause, that the mere fact funds were placed in a duly designated depository is not a complete defense, and cites

cases to the effect that if the depositing officer acquires knowledge of facts which show the bank is unsafe, he may be held responsible if he fails to have the funds removed. Each of the cases cited negatives any liability for want of due care; they each hold that where the depositing officer as one of the officers of the depository bank or otherwise actually knows the depository bank is insolvent but fails to remove the funds he is guilty of bad faith and active fraud, which renders him liable. Throughout this Court's opinion the duty to use care in determining and judging of the condition of the depository or depositories is confused with the duty to act when facts revealing a danger to the funds are actually known to the depositing fiduciary or officer. Both logic and authority compel that a distinction be drawn between these two situations. The instant case was decided by the Circuit Court of Appeals on the basis of the rule of law that relieves the depositing fiduciary or officer of any duty to determine and judge of the safety of a depository bank. In reversing the Circuit Court of Appeals and denying the validity of that rule of law this Court has departed from all existing precedents. All of the cases cited by this Court make this distinction clear and support the Circuit Court of Appeals decision.

Thus, in *Independent School District* v. *Flittie,* 54 S. D. 326, 223 N. W. 728, the first case cited by this Court for the proposition that a deposit in a designated depository is not a complete defense, the court deciding that case affirms the rule applied by the Circuit Court of Appeals in the instant case, saying, 223 N. W. 730:

> "If the responsibility of designating and continuing a depository is placed upon some one other than the treasurer, and the duty of the treasurer is to deposit in such depository when designated, the treasurer is

> thereby relieved from the usual duty of exercising care and diligence to keep himself informed and advised from time to time, as a prudent man, as to the continued solvency and financial soundness of the depository."

The next case cited by this Court, *Lane Independent School District* v. *Endahl,* 55 S. D. 73, 224 N. W. 950, arose in the same jurisdiction as the preceding case, re-affirmed the rule there stated, but as in the prior case imposed liability because the depositing officer had been the chief managing officer in the depository bank and had actively used the funds deposited to bolster a bank he clearly knew to be insolvent and beyond saving. In the next case cited, *Cozad* v. *Thompson,* 126 Neb. 79, 252 N. W. 606, the depositing officer was using the funds in question to lengthen the life of the insolvent bank in which he was one of the managing officers, thereby acting in bad faith. In *Zimmerman* v. *Coblentz,* 179 Md. 468, 185 Atl. 342, the depositing officer was president of the insolvent bank in which he continued to deposit funds; in *Jordan* v. *Baker,* 252 Ky. 40, 66 S. W. (2d) 84, the language is merely *dictum,* but again the court does not suggest a duty to exercise due care but merely asserts knowledge of facts might amount to "that degree" of negligence which would render the depositing officer liable.

All the cases decided by the lower federal and other courts in which the question has arisen have carefully drawn the distinction between failure to judge a designated depository bank with due care, and bad faith, *Town of Hamden* v. *American Surety Co. of N. Y.,* 9 Fed. Supp. 733 (D. C. Conn.), where the court concluded (741):

> "That such a treasurer with respect to deposits made in conformity with sec. 512 (creating a depository system) is responsible for losses resulting from

> the failure of the depository only if he acted in bad faith; that in the absence of bad faith he is not responsible." (Words in parenthesis added.)

Board of Education v. *Whisman*, 56 S. D. 472, 229 N. W. 522, 529, 530; *County of Marshall* v. *Bakke*, 182 Minn. 10, 234 N. W. 1; *Seneca Independent School District* v. *Traver*, 63 S. D. 68, 256 N. W. 365, 367; *Holt County* v. *Cronin*, 79 Neb. 424, 112 N. W. 561, 563.

In the District Court the instant case went to the jury solely on the question of whether Sam Howard had violated a supposed duty to investigate, judge and determine with due care the stability of the bank designated as a depository by the bankruptcy court; no question of bad faith was submitted to the jury. It was on this basis that the Circuit Court of Appeals held that the supposed duty to exercise due care as to the designated depository did not in law exist.

It is submitted that this Court has either misapprehended the issues presented by the instant case or has misapprehended the existing precedents. The reasons supporting the precedents are amply explained in respondents' brief, pp. 36-68 and will not be repeated here.

4. The opinion of this Court assumes that the trustee or receiver in bankruptcy has the common law duties of a fiduciary in the care of funds of the bankruptcy estate unless he is relieved of these by agreement, statute or order of court. While this Court has never heretofore been called upon to judge of the exact nature of a trustee or receiver in bankruptcy, on numerous occasions the lower federal courts have dealt with his status and have denied that he was a common law fiduciary, finding him rather a statutory officer of the court, *Imperial Assurance Co.* v. *Livingston*, 49 F. (2) 745, 748 (C. C. A. 8), *United*

States v. *Union Surety & Guaranty Co.*, 118 Fed. 482, 486 (D. C. N. Y.); *Bingaman* v. *Commonwealth Trust Co.*, 1 F. (2d) 505, 506 (D. C. Pa.); *Meehan* v. *King*, 54 F. (2) 761, 763, (C. C. A. 1). This Court has incidentally referred to bankruptcy receivers as officers of the court, *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568. And further, this Court by General Order in Bankruptcy XL, 11 U. S. C. A. 53, has expressly provided that "a receiver * * * appointed by the court to take charge of the property of a bankrupt after the filing of a petition, shall be deemed to be a *mere custodian* within the meaning of section 48 of the Bankruptcy Act, unless his duties and compensation are specifically enlarged by order of this court" (italics added). There was no showing that Sam Howard's duties or compensation as receiver were ever enlarged to make him in his capacity as receiver other than a "mere custodian" under the orders of this Court. By providing that the receiver in bankruptcy shall be merely a custodian, this Court has lulled receivers and their sureties into a false concept of their duties and corresponding liabilities, if it is now to judge their past conduct by the standard of a fiduciary. The receiver is paid only for the performance of duties of custodianship. Should he be now charged, though not paid therefor, with the high responsibilities of a fiduciary? That the trustee's duties in regard to deposits have always been conceived of as identical with that of the receiver, makes it clear neither had a fiduciary obligation as to the stability and safety of the depository bank.

5. However, entirely aside from the fact that trustees and receivers in bankruptcy are purely the creation of the statutes of Congress and the Orders of this Court, the Bankruptcy Act and General Orders contain such minute and detailed provisions for the handling of all money which reaches the hands of a trustee or receiver, that it

is inconsistent with the act and orders to hold the trustee or receiver to be under a duty to determine and judge with due care the condition of depository banks.

Unlike a common law fiduciary, a bankruptcy trustee or receiver cannot carry estate money in his pocket until there is a bill to be paid or a disbursement made nor can he place it in a safety vault nor could he during the period here under consideration deposit the money in a postal savings account. He cannot even deposit it in whatever bank he deems safest. He has only one course—to place the money forthwith upon its receipt in a bank which has been designated by the court as a bankruptcy depository, and which has filed with the clerk of the court a bond as provided in the order of designation. Nor is he free to withdraw funds from a designated depository as he thinks wise. Each depository is furnished by the court the names of the referees or clerks authorized to countersign the checks or warrants drawn by the trustee or receiver, General Order in Bankruptcy 29, 11 U. S. C. A. 53. The trustee or receiver can only withdraw when a referee, clerk or the court directs. The court has the power, without notice to the trustee, to appoint new depositories, increase or decrease the bond of any depository, revoke the designation of any depository. The trustee has no right to be heard in court on his opinion of any depository. The orders designating the depository, revoking it, or otherwise changing its status are made in an *ex parte* proceeding without notice or opportunity to be heard to anyone other than the bank itself. No rules of law limit the court's absolute discretion to create or abolish depositories upon such conditions as the court may choose. When the trustee or receiver receives estate money, he determines from the office of the clerk of court which bank or banks have been properly appointed by the court, qual-

ified as depositories and not had their appointment revoked, and must without more deposit in one such depository. He renders bi-monthly reports to the court as to his disposal of the money, Bankruptcy Act, Section 47(a) (10), 11 U. S. C. A. 75(a) (10). Where, under this system, is there room to imply that the trustee or receiver in bankruptcy must with due care examine and determine the safety and stability of each depository in which he places estate funds? Does not the carefulness with which Congress and Orders of this Court have expressly prescribed the selection and supervision of the depositories of the bankruptcy court, negative any implied duty on the trustee or receiver to exercise the care of the common law fiduciary for whom no bank has been approved by court order?

6. This Court, in refusing to follow the rule established by the cases that under the federal and state depository systems no liability will be imposed on the depositing officer in the event of a loss of funds through a failure of a designated depository for a failure to judge the bank with due care, suggests, as one of its reasons for so holding, that the rule was inapplicable because "the provisions of the Bankruptcy Act concerning the appointment of depositories and the deposits to be made by trustees are of a very different character" from those of the federal and state systems. This Court fails to mention wherein it has found any material differences. Comparison of the provisions of the Bankruptcy Act and General Orders with the federal and state depository systems shows that all the basic relationships created are the same and in many instances even the mechanical details of the state systems are identical with the bankruptcy system. In every one of the more than a dozen jurisdictions from which cases were cited in respondents' brief, pp. 48 to 60, the de-

pository systems were like that in bankruptcy in respect to the following features: (1) the depositing officer was not permitted by law to retain funds received in his official capacity in his possession or to place them where he thought safest; (2) he was required to deposit the funds in some designated depository; (3) the power to select and designate the depository, revoke the designation and approve a new depository, was lodged with a court or officer other than the one charged with the duty of making the deposits. Usually the statutes provide, as in the bankruptcy system, that the designating authority shall fix the amount and terms of the bond to be given by the depository, see *City of Billings* v. *Mass. Bonding & Insurance Co.*, 88 Mont. 91, 290 Pac. 246; *Missoula County* v. *Larson*, 83 Mont. 308, 271 Pac. 710; *Miller* v. *Batson*, 160 Miss. 642, 134 So. 567; Ala. Code Ann. 1928, Supp. 1932, Sec. 317; Fla. Comp. Gen. Laws 1927 Ann., 1934 Supp., Secs. 2404-2405. Similarly, the requirement of countersignatures of other officers in case of disbursements is common, see *Board of Education* v. *Nelson*, 33 N. D. 462, 157 N. W. 664; Ala. Code Ann. 1928, Supp. 1932, Sec. 315; Fla. Comp. Gen. Laws 1927 Ann., 1934 Supp., Sec. 2409. Reports of the amounts on deposit are generally made to the designating authority, see *Town of Hamden* v. *Am. Sur. Co. of N. Y.*, 9 Fed. Supp. 733 (D. C. Conn.); *Rosebud County* v. *Smith*, 92 Mont. 75, 9 Pac. (2d) 1071; Ala. Code Ann. 1928, Supp. 1932, Sec. 897; Fla. Comp. Gen. Laws 1927 Ann., 1934 Supp., Sec. 2410. Just as the deposit of bankruptcy funds creates a mere general claim against the designated depository and not a preferred claim, so in most state depository systems the relation established by the deposit of the depositing officer in the designated depository is that merely of general creditor and debtor, see *In re State Treasurer's Settlement*, 51 Neb. 116, 70 N. W. 532; *City of Parsons* v. *Fid. & Dep. Co.*, 29 F. (2d) 417

(D. C. Kan.) rev'd on other grounds, 43 F. (2d) 315; *Potter* v. *Fid. & Dep. Co.*, 101 Miss. 823, 58 So. 713; *U. S. Fid. & Dep. Co.* v. *Village of Bassfield*, 148 Miss. 109, 114 So. 26; *Board of Education* v. *Nelson*, 33 N. D. 462, 157 N. W. 664; *State* v. *Madison State Bank*, 77 Mont. 498, 251 Pac. 548; *Missoula County* v. *Larson*, 83 Mont. 308, 271 Pac. 710.

This Court states that under the federal depository system the monies deposited are in effect in the treasury of the United States and implies that under state depository systems similar results ensue. Referring to the funds as in the treasury of the state or federal government is merely a manner of describing the conclusion reached when the depositing officer is held not liable for failure to use due care as to the safety of the depository. The money is in fact in the bank, not in the treasury. If the bank fails, most states hold that the state, county, town or other governmental division owning the deposit must take its place as a general creditor of the bank and cannot have a preferred claim, cases cited above. No suggestion has ever been made that the fiction of the money being in the treasury would bar imposition of liability on the depositing officer where as an officer of the depository bank he knew of the bank's insolvent state. Money deposited with a bankruptcy depository is as much on deposit with the bankruptcy court as money deposited with a state or national bank serving as a state depository or a national bank serving as a federal depository is in the state or federal treasury.

7. This Court further points to the fact that bankruptcy funds are private funds whereas in the federal and state depository systems public funds are involved. What legal distinction should arise from this factual distinction is not clear. Bankruptcy funds prior to deposit

are in *custodia legis*. It has been deemed by Congress and this Court that the public interest in the handling of bankruptcy money was sufficient to warrant establishing a depository system therefor identical in all of its essential features with the existing federal and state depository systems. Why should an officer of a bankruptcy court administering funds in *custodia legis* and operating under a depository system be held to a higher degree of duty than a public officer operating under a similar depository system on the theory the former is dealing with private funds, the latter public funds? The usual rule places a higher degree of care upon persons handling public funds than on persons handling private funds, as was stated in one of the cases cited by this Court in its opinion, *Cozad* v. *Thompson*, 126 Neb. 79, 252 N. W. 606, 608. This Court admits that an officer depositing federal funds in a bank designated as a federal depository "is relieved of all responsibility for the stability of the depository." But if the same bank has been designated also as a bankruptcy depository and qualified, this Court holds that a trustee in bankruptcy depositing bankruptcy estate funds therein remains under responsibility for its stability.

8. The decision of this Court is socially undesirable. It emasculates the depository system in its practical result. The designation by the bankruptcy court of a depository becomes meaningless. All of the statutory provisions and orders of court become mere formalities. The courts will become lax in designating and revoking designations of depositories because the duty has been shifted by this Court's decision to the trustee or receiver to determine and judge of any bank's stability. It is the trustee or receiver and his surety who bear the responsibility. The surety of the trustee or receiver becomes a surety, in effect, of the depository bank. The courts will not exercise

their former care in obtaining and examining reports of amounts on deposit, changing bonds, and otherwise regulating depositories. The intent of Congress to have the bankruptcy court responsible for the functioning of the depository system will be defeated. Receivers, paid on the supposition they are mere custodians, will not want to assume the burdens of the office. Nor will trustees. Why should they, from all other federal and state officers, be singled out for more onerous responsibilities? Trustees and receivers in bankruptcy normally perform administrative, not fiscal, duties. If any depository bank fails, the trustee or receiver will be compelled to defend a law suit. Why should he take a risk which the creditors, in receiving his reports, do not?

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, affirmed.

Respectfully submitted,

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WILLIAM P. SMITH,
Counsel for Respondents.

WALTER BACHRACH,
R. WEYAND,
Of Counsel.

Certificate of Counsel.

We, Julius Moses, Lloyd Heth and William P. Smith, counsel for the above named Sam Howard and Continental Casualty Company, a corporation, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

JULIUS MOSES,
LLOYD HETH,
WILLIAM P. SMITH,
Counsel for Respondents.

WALTER BACHRACH,
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SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1937.

United States, on relation of Chester A. Willoughby, Trustee, Petitioner, *vs.* Sam Howard et al. | On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 3, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether a trustee (or receiver) in bankruptcy and the surety on his official bond can be held liable for the loss resulting from the insolvency of the bank in which the estate's funds were deposited, if it was one of the depositories designated by the court under U. S. C. Title 11, § 101.

Sam Howard was trustee in bankruptcy of 114 separate bankrupt estates, and was receiver of 9, in the federal court for northern Illinois, Eastern Division. Between August 20, 1930, and June 21, 1932, he had deposited the funds of each of the 123 estates in the Phillip State Bank and Trust Company of Chicago, as ordinary commercial accounts. On the latter date the bank, being insolvent, closed its doors. The aggregate of his bankruptcy deposits in the 123 accounts was, at the time of its closing, over eight times the penalty of the bank's depository bond of $50,000. The only dividend received by the bankruptcy estates was about 11 per cent—which was paid from the amount collected on the depository bond.

As required by U. S. C. Title 11, § 78, Howard had given an official bond to the United States for each estate, and Continental Casualty Company was the surety. The form of the trustee's bond was that prescribed by Form 25 of the General Orders and Forms in Bankruptcy, pursuant to U. S. C. Title 11, § 53.

The obligors bound themselves to pay any loss resulting to the estate from failure by Howard, (a) to obey any order of the court, (b) truly and faithfully to account for all moneys, (c) faithfully

to perform his official duties as trustee.[1] It is agreed that the condition of the bonds given as receiver was in effect the same.

Howard resigned as trustee or receiver of each estate. Chester A. Willoughby, who succeeded him, brought in that court, pursuant to leave, three actions in the name of the United States against Howard and the Casualty Company. In these actions, which were consolidated, recovery was sought on each bond on the ground that its condition had been broken by Howard's failing to perform his official duties as trustee or receiver. The failure assigned was that he negligently deposited the funds, or permitted them to remain, in the Phillip Bank, whereas ordinary care and prudence would have required him to desist from such practice and take care that the aggregate of the deposits of estate funds in that bank should not exceed the penalty of the depository bond. The defendants moved to dismiss the complaints on the ground that they failed to disclose any breach of the condition of the bonds. Upon the denial of the motions, the consolidated cases were heard before a jury on the issue whether Howard had been negligent in the performance of his official duties in so depositing the funds, or in leaving them, in the Phillip Bank.

The following, among other facts, appeared: About twenty Chicago banks had been designated by the court as depositories of bankruptcy funds in that district. Howard, who had for years served as trustee and receiver of bankrupt estates, had, prior to August, 1930, deposited the funds of the estates either in the Central Trust Company of Illinois or the Foreman State National Bank of Chicago. In July he was solicited to transfer his bankruptcy deposits to the Phillip Bank, a small institution. He agreed to do so if the Phillip Bank should become a depository, would make him unsecured personal loans sufficient to discharge his existing personal indebtedness to the Central Trust Company and the Foreman State National Bank—and would give him thereafter like accommodation. The Phillip Bank loaned him $11,000; Howard paid his indebtedness to the other banks; and on August 20, the Phillip Bank qualified as a depository, giving a bond in the sum of $50,000. Within the next

[1] The condition of each bond given as trustee was: "Now, therefore, if the said Sam Howard, Trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said Bankrupt, which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise, to remain in full force and virtue."

few days, Howard opened in the Phillip Bank accounts for bankruptcy estates with deposits aggregating $249,968.15. The number of his accounts, the aggregate amount on deposit, and the amount of his personal loans from that bank increased from time to time. When the bank closed, the accounts numbered 123, the deposits aggregated $416,833.90, and the loans to Howard $17,500. The Phillip Bank's depository bond remained at $50,000. He knew that during this period of deposit there were several heavy runs on the Phillip Bank, its deposits were steadily declining and its resources were being drained.

Defendants' motions for a directed verdict were denied; the jury found for the plaintiff verdicts aggregating $225,740.45; a new trial was refused; and an appeal was taken to the Circuit Court of Appeals, where the case was heard first by two judges, then reargued before the full court. A condensed report of the evidence and other proceedings at the trial occupies 250 pages of the printed record. Much evidence offered by defendants had been excluded; many rulings sought had been refused; and timely exception had been taken to instructions given to the jury and to those refused. Eighty-four assignments of error had been filed with the petition for appeal. But the appellate court examined only a few of the assigned errors. For it held that the trial court should have directed a verdict for the defendants, on the ground that, since Howard had deposited and maintained the funds in one of the banks designated by the court as depositories, he fully performed his official duty in respect to the care of the funds. It reversed the judgment with direction to grant a new trial and to proceed in accordance with the opinion. 87 F. (2d) 243. One judge dissented. We granted certiorari because of the importance of the question presented.

First. That the obligors in the bonds are liable only for breach by Howard of an official duty may be assumed. By the common law[2] every trustee or receiver of an estate has the duty of exercising rea-

[2] *Receiver in Bankruptcy:* In re Curtis, 76 F. (2d) 751, 753 (C. C. A. 2); In re C. M. Piece Dyeing Co., 89 F. (2d) 37, 40 (C. C. A. 2); Hartford Accid. & Indem. Co. *v.* Crow, 83 F. (2d) 386, 388 (C. C. A. 6). *Trustee in Bankruptcy:* In re Reinboth, 157 Fed. 672, 674 (C. C. A. 2); Carson, Pirie, Scott & Co. *v.* Turner, 61 F. (2d) 693, 694 (C. C. A. 6); In re Kuhn Bros., 234 Fed. 277, 281 (C. C. A. 7); In re Newcomb, 32 Fed. 826 (N. D. N. Y.); In re B. A. Montgomery & Son, 17 F. (2d) 404, 406 (N. D. Ohio); compare Delaware *v.* Irving Trust Co., 92 F. (2d) 17, 19 (C. C. A. 2); In re Kane, 161 Fed. 633, 639 (N. D. N. Y.). *Equity Receiver:* Gutterson & Gould *v.* Lebanon Iron & Steel Co., 151 Fed. 72 (C. C. M. D. Pa.); Hitner *v.* Diamond State Steel Co., 207 Fed. 616, 622 (D. Del.). *Trustee:* Barney *v.*

sonable care in the custody of the fiduciary estate unless relieved of such duty by agreement, statute, or order of court. Obviously, Howard was not relieved of the duty by any agreement. The question for decision is whether under the Bankruptcy Act,[3] or any order of the court, this duty in respect to the care of funds was limited to depositing them in one of the depositories designated by the court under U. S. C. Title 11, § 101, so that Howard was relieved of all duty to exercise care in selecting the depository and maintaining funds therein.

Second. No statute relieved Howard of the common law duty to exercise care in the custody of the funds. The only relevant provisions of the Bankruptcy Act prescribing duties of the trustee are:

"Section 61 (U. S. C. Title 11, § 101). *Depositories for Money.* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

"Section 47 (U. S. C. Title 11, § 75). *Duties of Trustees.* (a) trustees shall respectively . . .

"(3 deposit all money received . . . in one of the designated depositories;

"(4) disburse money only by check or draft on the depositories in which it has been deposited;

"(5) furnish such information concerning the estates . . . and their administration as may be requested by parties in interest;

. . .

"(7) lay before the final meeting of the creditors detailed statements of the administration of the estates;

"(8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; . . .

"(10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as

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Saunders, 16 How. 535, 545-46; United States Nat. Bank & Trust Co. *v.* Sullivan, 69 F. (2d) 412, 415-16 (C. C. A. 7); Fidelity & Deposit Co. *v.* Redfield, 7 F. (2d) 800, 802 (C. C. A. 9); Johns *v.* Herbert, 2 App. D. C. 485, 497; Caldwell *v.* Hicks, 15 F. Supp. 46, 52 (S. D. Ga.); compare Strauss *v.* United States Fid. & Guar. Co., 63 F. (2d) 174, 176-77 (C. C. A. 4); American Bonding Co. *v.* Richardson, 214 Fed. 897, 901 (C. C. A. 6); Thompson *v.* Hays, 11 F. (2d) 244, 247 (C. C. A. 8). *Executor:* see Taylor *v.* Benham, 5 How. 233, 275; Glasgow *v.* Lipse, 117 U. S. 327, 333-34; Moore *v.* Moore, 47 App. D. C. 18, 27. *Guardian:* Lamar v. Micou, 112 U. S. 452, 465; Corcoran *v.* Kostrometinoff, 164 Fed. 685, 687-88 (C. C. A. 9).

[3] July 1, 1898, c. 541, 30 Stat. 544, as amended; U. S. C. Title 11.

may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; . . ."

Obviously the Act does not in terms relieve the trustee of the common law duty to exercise care in the custody of funds. The designation of banks of deposit proper for bankruptcy funds, like the listing of legal investments for trustees and guardians, limits the discretion which can be exercised by the depositing officer and may render him absolutely liable for the loss of funds placed in a non-designated depository. But the fact that the freedom of choice of the fiduciary is limited by statute does not relieve him of the duty of exercising care and prudence within the field left to his discretion. As he may not shut his eyes to the fact that a so-called legal investment is no longer sound, he may not disregard the fact that a depository proper when designated is no longer safe.[4] The mere imposition of statutory duties does not remove liability for breach of existing common law duties. Compare *Bowerman* v. *Hamner*, 250 U. S. 504, 510-11; *Yates* v. *Jones National Bank*, 206 U. S. 158, 178; *Mechanics Universal Joint Co.* v. *Culhane*, 299 U. S. 51, 57.

Third. No order of the court limited the common law duty of Howard to exercise care in the custody of estate funds. The Phillip Bank was designated as a depository on its own application. No order directed Howard to deposit funds in the Phillip Bank; and no order specifically authorized him to do so. Being free to select any one or more of the designated depositories, Howard was in respect thereto under the common law obligation to exercise care in the performance of his functions as a fiduciary. While he was making deposits in the Phillip Bank there were about twenty others in the Chicago area which were designated depositories, so he had a wide range from which to choose. By designating the Phillip Bank as a depository the court may have justified Howard in assuming that on August 20, 1930, it was a trustworthy place of deposit for bankruptcy funds to the extent of $50,000. But throughout the period of deposit the legal duty to exercise care remained. If at any time he discovered facts tending to show that the place of deposit was no longer safe, it was his duty to bring the

[4] See Delafield *v.* Barret, 270 N. Y. 43, 48-49; Matter of Flint, 240 App. Div. 217, 225; Matter of Blake, 146 Misc. 780; Matter of Fraser, 150 Misc. 43; Matter of Jacobs, 152 Misc. 139, 141-42; Estate of Allis, 191 Wis. 23, 31-32.

facts to the attention of the court.[5] And at no time was Howard justified in maintaining a deposit not entirely secured by the depository bond if he had reasonable cause to doubt the stability of the bank.

Fourth. The contention that the Bankruptcy Act established a depository system which relieved trustees and receivers wholly of the duty of exercising care as to the condition or stability of a depository rests upon false analogy. For federal public funds Congress has provided a depository system by which the moneys, as soon as deposited are in effect in the Treasury of the United States. 31 U. S. C. §§ 476-78, 495; 12 U. S. C. §§ 391, 392. Under that system an officer who has duly made the deposits is relieved of all responsibility for the stability of the depository. Similar provision has been made in many States for the deposit of public funds of the state or municipality.[6] But the funds of bankruptcy estates are private funds, see *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 257, note 11; and the provisions in the Bankruptcy Act concerning the appointment of depositories and the deposits to be made by trustees are of a very different character.

As the exercise of ordinary care in making and maintaining deposits, even if made in a designated depository, was part of Howard's official duties, he and his surety are liable on the bonds if he failed in this respect. On that issue the evidence—particularly in view of the personal loans to him—was ample to justify submitting the question to the jury. The judgment of the Circuit Court of Appeals is, therefore, reversed; and the cause is remanded to it for consideration of the other errors which the defendants assigned concerning the conduct of the trial.

Reversed.

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[5] Compare Jordon v. Baker, 252 Ky. 40, 49; Zimmerman v. Coblentz, 179 Md. 468, 476.

[6] In a number of States statutes specifically relieve public officers of liability if the funds entrusted to them are deposited in the manner provided by law. Some courts hold that in the absence of such a provision the mere fact that the funds are placed in a duly designated depository is not a complete defense; and that if the officer acquires knowledge of facts which show the bank to be unsafe, he may be held responsible if he fails to have the funds removed. Independent School Dist. v. Flitty, 54 S. D. 526; Lane Independent School Dist. v. Endahl, 55 S. D. 73; Cozad v. Thompson, 126 Neb. 79; see Jordan v. Baker, 252 Ky. 40, 49.